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THE CASE OF WILLIAM WYMAN.

The Phœnix Bank of Charlestown, was incorporated in March, 1832, with a capital of $150,000, which was increased by an additional act of the legislature, to $300,000, in March, 1836. In October, 1836, William Wyman, who had before been cashier of the institution, was elected its president, with a salary of $2000 a year, which was increased to $3000 on the 1st of July, 1839. He was afterwards annually elected president of the bank up to 1842. The credit of the bank had ever been undoubted, and its circulation very considerable, amounting, at times, to near $200,000. The reputation of the president as a man of integrity and financial skill, had uniformly been of the highest order. A dividend of 3 per cent. for the six months which would have expired on the first of October, 1842, had been declared by the directors, and the confidence of the stockholders, depositors, bill-holders, and the community at large had never been more unshaken, when it was announced, on the third of October, 1842, to the public, that the bank "had blown up," its capital had been absorbed, and its assets dissipated.

The consternation among those who had invested, as had been the case in many instances, their all in the stock of the bank, and the indignation and alarm felt by the creditors of the bank and the public, can hardly be conceived by those who did not witness it. The public called loudly for an investigation of the affairs of the bank, and the conduct of its officers. They felt that they had been

grossly deceived, and cruelly cheated, and they demanded that justice should be administered to the guilty authors of this wide-spread mischief and suffering.

The grand jury of Middlesex county having returned a bill of indictment against Wyman and Thomas Brown, Jr., who had been cashier of the bank, as principals, and William H. Skinner, as accessory, for the crime of embezzlement, in having fraudulently converted the assets of the bank to their own use, the indictment came on for trial at Concord, in August, 1843, before Judge Allen, one of the justices of the court of common pleas. Asahel Huntington, district attorney for the northern district, and Daniel Wells, district attorney for the western district, appeared for the commonwealth. Messrs. Webster and Franklin Dexter for Wyman, and Choate and Sidney Bartlett for Brown. The jury returned a verdict of acquittal in the case of Brown, but were unable to agree in that of Wyman.

At the following October term of the court at Lowell, before the same judge, and the same counsel for the government and for Wyman as in the first trial, the indictment came on again for trial, and after an investigation which occupied many days, a verdict of guilty was returned by the jury. (6 Law Rep. 385; 7 Law Rep. 444.) A bill of exceptions to certain rulings of the judge was filed and allowed, and a motion in arrest of judgment for an alleged defect in the indictment was also filed, and the questions thereby raised were reserved for the consideration of the supreme judicial court. The trial had proceeded upon the ground that in the prosecution of a bank officer for embezzlement, as in that of a servant, clerk, &c. the form of charging the offence and the nature of the evidence by which it is to be sustained, the 10th sect. of the 133d chap. of the Revised Statutes was to be applied.

Whether this section did apply to cases of embezzlement by bank officers, was, however, so far raised upon the exceptions argued before the supreme court, that that court in an elaborate opinion, wherein they considered the various grounds taken in the trial, came to the conclusion that in regard to such officers, the strictness of statement and proof required by the common law, had not been modified by statute. Consequently a new trial was ordered, and the case was remitted to the court of common pleas for further proceedings. Soon after this opinion had been declared, the legislature, then in session, on the 25th March, 1845, passed an act whereby the provisions of the 10th sect. of the 133d chap. Revised Statutes should also apply to all prosecutions of a similar nature against presidents, directors, &c. of banks.

At the June term of the court, 1845, a new bill of indictment was found and returned against Wyman, as principal, and William H. Skinner, as accessory, for the embezzlement of the moneys of the Phœnix Bank; in which indictment the offence was alleged to have been committed on the 1st April, 1842, and that "he, the said Wyman, being then and there an officer and agent of said corporation, did by virtue of his said offices and employments, and while he was employed in his said offices, then and there have, receive, and take into his possession certain money to a large amount, to wit; the amount of three hundred thousand dollars, &c. &c., and was then and there intrusted by said president, directors and company, &c. with the money aforesaid." The indictment then averred a felonious embezzlement of the money by Wyman, and concluded with proper averments that he thereby feloniously did steal, take, and carry away the same, &c.

The trial of this indictment came on at the June term of the court by adjournment, on the 1st September, 1845, at Concord, before Washburn, J., in which, as in the trials of the former indictment, it proceeded only against the principal, Wyman. Mr. Huntington, the district attorney, being unable, by reason of ill health, to manage the prosecution on the part of the government, J. P. Rogers was appointed by the court to act in his absence. For the defendant, Messrs. Webster, Choate, and E. R. Hoar appeared, and moved the court to quash the indictment on the ground that no offence was therein substantially set forth.

As the decision of this question depended upon the effect which was to be given to the act of March, 1845, above referred to, the question was argued at great length, and with distinguished ability and eloquence by Mr. Choate, who was briefly replied to by Mr. Rogers, and was followed by Mr. Webster, who reiterated and enforced with much earnestness the positions taken by Mr. Choate. The principal grounds upon which the counsel for the defence rested their objections to the applicability of the act referred to, to the present case were, *first*, that by its terms it did not relate to past transactions, and unless it did so, in terms, it should be construed to apply to the future only. *Second*, if intended to apply to the case of Wyman, it was unconstitutional, as being *ex post facto*. The motion was overruled by the court in an opinion which we shall publish hereafter.

The defendant's counsel then moved the court that the government should be confined in their proof to one single substantive act of embezzlement, and that the district attorney should be required to elect the act in regard to which he should offer evidence. This

motion was sustained by an extended argument and a reference to authorities, but was overruled by the court in an opinion in which the judge examined the history of the changes in the English and Massachusetts statutes upon the subject, and ruled that as the defendant was charged generally with embezzling $300,000, on the 1st of April, 1842, it was competent for the government to offer evidence of any embezzlement of that sum or any part of it in money or the commercial representatives of money, by the defendant within six months of that date, limited only by such directions as the court might prescribe, should a bill of particulars be prayed for.

The defendant's counsel then moved the court, that the district attorney should furnish a bill of particulars of the acts of embezzlement, in regard to which he proposed to offer proof. After considerable discussion upon the propriety of granting this motion, the court directed that a general statement of the transactions in regard to which the government proposed to offer evidence, should be filed by the district attorney, who thereupon filed ten specifications of subject-matter in regard to which he should offer evidence, which were as follows:

1. The government propose to show that the defendant fraudulently used and embezzled the assets of the bank, which it possessed April 1, 1842, and to show this it will rely, with other proof, on evidence that on that day it had that amount of property in possession, and that on the 1st of the succeeding October, it was deficient. And by the books of the bank, the representations of the defendant, and the manner in which he transacted the business of the bank in the interval, and his false representations and exhibitions of the alleged assets of the bank in October and prior.

2. That he sold and embezzled during the period aforesaid, a large amount of treasury notes, that he disposed of them, and has never accounted for, but has fraudulently appropriated them, or the proceeds of them to his own use.

3. That he has received on the notes due in first specification, bills of the Phœnix and other banks, which were received by him or others for the bank, which he has not accounted for, or in place thereof has substituted the paper of others.

4. That during the period aforesaid he has used a large amount of the assets of the bank, for which he has falsely substituted a certain amount of stock and demand notes, which said stock and demand notes were never given to said bank for the purposes represented.

5. That during the period aforesaid, he falsely and fraudulently received from the bank a large amount of money, for which he substituted certain checks of people in the Navy Yard, which checks had been paid.

6. That he fraudulently took the note of Amos Binney, the property of the bank, and embezzled it.

7. That he embezzled the checks and bills of the bank, and negotiated them with the Suffolk, Shoe and Leather Dealers, Eagle, Market, and City Banks.

8. That he committed acts of embezzlement in his transactions with Stanley, Reed & Co. in the manner of taking the money of the bank for their checks, a list of which he has furnished the directors.

9. That he has embezzled the money of the bank and the property of the bank by appropriating them to discharge liabilities, nominally the liabilities of the bank, but given by him without authority and on his own account, or for which the bank was not liable.

10. That he had used and disposed of the property of the bank, and when called upon to give an account of what he had done with the property has refused and neglected to do so, and given a false account of it.

Mr. Webster then, in behalf of the defendant, moved the court to restrict the evidence of the government to the embezzlement of money *eo nomine*, that is, coined metals, but remarked that after the opinion already expressed by the court, he did it rather to save his client's rights than with the expectation that the motion would be granted. The court overruled the motion.

The government then proceeded to call the witnesses and put in the evidence in the case, which occupied nearly six days. It appeared that among the assets of the bank at the time of the "blow up," were "demand notes," signed by Stanley, Reed & Co. as principals, and John Skinner, as surety, amounting to about $126,000; checks drawn by Stanley, Reed & Co. on various banks, in which they had no funds, amounting to about $86,000; unaccepted drafts drawn by Stanley, Reed & Co. on various houses, indorsed by John Skinner, between May, 1840, and December, 1841, amounting to over $87,000, none of which appeared upon the books of the bank as having been discounted. Besides these there were notes and acceptances of Stanley, Reed & Co. indorsed by J. Skinner, discounted between September 30, 1839, and September 26, 1842, amounting to $59,485 — making in all due from Stanley, Reed & Co. a fraction short of $360,000; W. H. Skinner, who was indicted as accessory, being the surviving partner of that firm. The immediate liabilities of the bank were about $392,000, and the total of available funds amounted to about $21,000 at the time of its being closed.

The opening statement of Mr. Choate, in defence, principally as to the law of the case, occupied four hours, and among other points taken was this, that the defendant had not been shown to *have been intrusted with the money, &c. of the bank*, the same being in the custody of the cashier, and that, therefore, he could not be liable under a charge of *embezzlement;* that if he had feloniously converted the money to his own use, it was larceny on his part. He read the by-laws of the stockholders authorizing the directors to choose a president and cashier, and the directors' by-laws prescribing the duties of the president and cashier. The cashier was required to give bonds — was to have the charge of all notes, mo-

neys, &c. of the bank, and at the close of each day, "to have the whole in *his possession* — deposit the same in the vault, and keep the key," &c.

He read also the following extracts from the opinion of the supreme court, given in the former case, and insisted that it was conclusive upon the point. "It is one of the incidents of an aggregate corporation, authorized to make by-laws, to delegate their authority to a part of their body, and the body to whom such authority is delegated become the efficient representatives of the corporation. In respect to the banks in this commonwealth, they have all had from the creation of the Massachusetts Bank, in 1783, to the present time, a board of directors, selected from among themselves, one of whom has been constituted their president. These persons, as indicated by their name, have a directing and supervisory power over the affairs of the institution, rather than the active management of their internal concerns, which are usually intrusted to officers by them appointed, and are designated as cashiers, tellers, book-keepers, clerks, messengers and porters. The president and directors are also the higher officers of the institution. They control and employ the funds of the bank, and in the discharge of the duties of such employment, they are made personally liable for official mismanagement." "We are, therefore, of opinion that the term 'officer,' as used in the 27th sect. of the 126th chap. of the Revised Statutes, is of that comprehensive character as to include within its embrace not only the officers in rank under the cashier, but the superior officers also, and that the president and directors being officers of banks, and as such within the mischief intended to be prevented, they are also within its remedies. *And where they are properly charged as intrusted with the property of the bank, or of its depositors, they may, on proof of their guilt, be punished for the crime of embezzlement, and not merely of a simple larceny.*" "The court are also of opinion that even if the Revised Statutes, chap. 133, sect. 10, did embrace within its provisions offences committed by officers of banks, as specified in chap. 126, sect. 27, still the language and terms made use of in the 10th section, are such that if the person charged be other than a clerk or servant of the bank, *he must be indicted as an agent of the bank, and as such agent, averred to be intrusted with its funds* or of those deposited therein, and *which agency must be specially proved before evidence of embezzlement in the manner stated in the said section can be admitted against him.*" "It is for the officer of the government to determine in regard to the character of the indictment, whether the same can be sustained, and as to the manner in which an agency

on the part of the president *as to the custody* of the funds of the bank can be proved," &c.

He farther referred to the form of the indictment itself as sustaining this position. Mr. Rogers, on the other side, contended that the determination of this question was not called for in the former case, and the *dicta* of the court now read were mere obiter rulings upon assumed premises; that the directors never meant to divest themselves of the control of the money or funds, or to give it to the cashier; that here the evidence tended to show that the defendant acted as holding the whole power of the entire board; and that embezzlement does not necessarily imply custody at all.

Mr. Webster replied. And the court having intimated an opinion that it should regard the opinion of the supreme court already read as imperative in the trial of this case, stated to the counsel that the question whether the funds had been so intrusted to the defendant as to bring him within the rule laid down by the supreme court, was one of fact for the consideration of the jury.

Mr. Rogers then inquired of the court what was to be understood as an "intrusting of the funds," within the language of the supreme court. The court replied, that although not called upon to define what would be an intrusting, as applicable to all possible cases, he would suggest what struck his mind as not constituting an intrusting under that decision, and the counsel for the prosecution would see how it bore upon the present case. If the president and directors of an ordinary country bank, at a regular meeting of the board, with a fraudulent intent to get possession of the moneys of the bank, were to discount notes and direct the cashier to pay out the money upon them, knowing them to be worthless, it would be a conspiracy and not an embezzlement, unless the cashier was privy to the fraud. If the cashier participated in the fraud, it would be embezzlement on his part, and the president and directors would be accessories. If the defendant, acting as president and directors, did the same thing and no more, and the cashier innocently paid out the money, could it be any more an embezzlement in the defendant than in the president and directors in the case supposed? To test this — if the cashier was party to the fraud he clearly would be liable for embezzlement. Why? Because intrusted with the funds. Could the defendant in that case be otherwise indicted than as an accessory? Clearly not unless he and the cashier had joint possession of the funds. If they had not joint possession, one must be principal and the other accessory. If then the cashier was so intrusted with the funds as to render him liable for embezzling them, can the same funds at one and the same time be re-

garded, within the meaning of the supreme court, as intrusted to the defendant, so as to render him liable for embezzling them by an act in which the cashier did not partake?

After this explanation Mr. Rogers stated that he had looked over the evidence bearing upon the question of the funds having been intrusted to the defendant, any otherwise than as resulting from his being president of the bank, and was satisfied he could not consistently ask of the jury to convict the defendant upon that evidence, under the decisions of the supreme court, and thereupon a verdict was taken in favor of the defendant, and he was accordingly discharged from the indictment.

Recent American Decisions.

Superior Court of New Hampshire, Cheshire, July Term, 1845.

PECK ET AL. *v.* JENNESS ET AL. in Error.

Those portions of the opinion in *Ex parte The City Bank of New Orleans*, (7 Law Rep. 553,) which relate to the jurisdiction of the district courts in bankruptcy, cannot be received as matters of authority absolutely binding upon the state courts.

The jurisdiction of the state courts is derived from the laws of the several states, and is independent of the bankrupt act, which neither limits nor enlarges it.

Creditors of a bankrupt having claims capable of being asserted in the state courts, may pursue their remedies there, notwithstanding their claims are debts capable also of being asserted under the bankruptcy.

The jurisdiction of the state courts over such debts is not a jurisdiction "in bankruptcy;" the creditors who pursue their remedies under it, adversely to the bankruptcy, are not creditors "who claim any debt or demand under the bankruptcy;" and the proceedings had upon their claims are not matters and things "done under and in virtue of the bankruptcy."

Mortgages and liens, which are saved by the bankrupt act, may be enforced in suits within this jurisdiction; and the district courts cannot interfere with, or control the exercise of it.

The defendants pleaded discharges in bankruptcy. The plaintiffs replied an attachment upon the original writ, and prayed judgment against the property. The defendants rejoined that the district court, on the petition of the assignee, had ordered and decreed that the sheriff should deliver the goods to him, to be administered in his said capacity. Held, that the order and decree enforced no duty upon the sheriff, and that the rejoinder was not a sufficient answer to the replication.

ERROR, to reverse a judgment rendered in the common pleas. The original action was assumpsit, instituted October 8, 1842, by

John S. Jenness, John Gage, and John E. Lyon, against Philip Peck and William Bellows, the plaintiffs in error, who were partners in trade. It appeared, from the record, that the writ was served October 10, 1842, by an attachment of the partnership property, and of the separate property of each partner. The defendants, at the October term, 1843, pleaded severally in bar of the further maintenance of the action. The plea of Peck set forth that on the 26th of November, 1842, he being then a resident of Walpole, in the county of Cheshire, presented his petition to the district court, &c. wherein he averred that he was a resident of said Walpole — that he was a copartner in two firms, under the style of Bellows & Peck, and Philip Peck & Co. consisting of himself and William Bellows — that he was owing debts in his private capacity, and as a copartner in said firms — that a list of his creditors and their demands was annexed, and a schedule of his property, private and copartnership — that he was unable to meet his engagements, and therefore applied for the benefit of the act of congress, entitled, &c., and prayed that he might be decreed a bankrupt, and to have a certificate of discharge from all his debts provable under the act. The plea then averred that Bellows, his copartner, on said 26th of November, presented his petition, setting forth similar matters in relation to himself, and containing a similar prayer for a decree and discharge. And it then averred, that upon the presentation of each of said petitions such proceedings were had, that after due notice to all persons interested to appear, &c. it was ordered and decreed by the district court, holden on the 21st day of December, 1842, that said Philip Peck and William Bellows, and each of them be declared bankrupts, in their private capacities, and as copartners of said firms — that on the 28th of December, 1842, Aaron P. Howland was duly appointed assignee, &c. and accepted the trust, &c. — that Peck afterwards presented his petition to the district court, praying for a discharge and certificate, &c. — that notice was ordered, &c. and due publication made — and that on the 21st of June, 1843, it was ordered and decreed that he be, and was fully discharged of and from all his debts owing by him in his private capacity, and as partner, &c., and he averred that the promises alleged in the declaration, were made before the 26th November, 1842, were provable under the act, and were not made in any fiduciary capacity. The plea of Bellows contained similar averments in relation to his petition, &c.

The plaintiffs replied to the several pleas, that before any act of bankruptcy, and before the petitions, they sued out their writ of attachment, &c. which was served October 10, 1842, by a deputy sher-

iff, who attached and took into his possession, and still retained the custody of, divers goods, &c. and made due return of the writ, &c. wherefore they prayed judgment to be levied of the goods and chattels attached. The defendants rejoined, that on the 25th of July, 1843, Howland, the assignee, presented a petition to the district court, setting forth that the plaintiffs had caused said goods to be attached; that such attachment was not a valid lien on the goods as against him as assignee; that by reason of it neither the sheriff nor his deputy could lawfully detain or keep the goods from him: and praying the court to order and decree that the sheriff and his deputy should render an account to him of all the goods attached, and deliver the goods to him, or the proceeds of the sales thereof, and that on the 15th of January, 1844, after due notice and a hearing of the parties, it was ordered and decreed by the district court, that the sheriff and his deputy should deliver the goods to said Howland, to be administered in his said capacity, &c. Wherefore they prayed judgment, whether the plaintiffs ought to have judgment to be levied as prayed for in their replications. The plaintiffs demurred generally to the rejoinders.

Judgment was rendered for the plaintiffs, March term, 1845, to be levied upon the goods, according to the prayer of the replications. The defendants thereupon sued this writ of error, and assigned for error that their pleas and rejoinders were sufficient in law to preclude the plaintiffs from maintaining their action, and that the replications were no sufficient answer, &c.

Henderson and *Edwards*, for the plaintiffs in error, relied upon *Ex parte The City Bank of New Orleans*, (reported 7 Law Rep. 553,) and submitted the case without argument.

C. B. Goodrich, of Massachusetts, (with whom was *Chamberlain*,) for the defendants in error. I. An attachment on mesne process, before and on the 19th of August, 1841, constituted, by the laws of New Hampshire, a valid lien or security. I rely upon statutes and decisions cited by this court in *Kittredge* v. *Warren*, and *Kittredge* v. *Emerson*, one of which is Laws of New Hampshire, ed. of 1830, p, 101, "All lands, &c. belonging to any person, *shall stand charged* with the payment of all the just debts of such person, as well as his personal estate, and shall be liable to be taken in execution for the satisfaction of the same." These statutes clothe any person, who avers himself a creditor, with a power available at his pleasure, over the estate of the supposed debtor, for his individual benefit, defeasible if he fail to prove himself a cred-

itor. That an attachment constitutes a lien, appears also from *Tyrell's Heirs* v. *Rountree*, (1 McLean, 95); S. C. on error, (7 Peters, 464); *Wallace* v. *McConnell*, (13 Peters, 151); *Beaston* v. *Farmers Bank of Delaware*, (12 Peters, 128); *Hubbard* v. *Hamilton Bank*, (7 Metcalf, 340); *Kilburn* v. *Lyman*, (6 Metcalf, 299.)

II. If the proposition that an attachment is a lien or security by the laws of New Hampshire, is admitted, it necessarily results that it is within the proviso of the bankrupt act, because the proviso, *quoad* the subject-matter thereof, adopts the law of the state. The cases from the supreme court of the United States show that an attachment had been regarded as a lien and security — as a vested interest, prior to the 19th of August, 1841. Congress must be presumed to have known the extent of these decisions. When they saved liens, securities, and other vested interests, their presumed intention was to protect, at least, those things which the judiciary of the United States had clothed with the character of liens, securities, and vested interests. Congress, prior to 19th of August, 1844, regarded attachments as liens, &c. 1 Story's Laws of United States, 58; Jud. Act 1789, sec. 12; Ibid. 821, 822, Act of 1801; Ibid. 743, Bank. Act, 1800, ch. 19, sec. 31. It is a lien without reference to the proviso, because the act passes nothing more than the bankrupt might convey, fraud excepted. The proviso does not save liens and securities of the common law, of equity, of admiralty, or liens by the laws of the United States, but liens and securities valid by the laws of the states respectively. The law of New Hampshire is to be ascertained by the decisions of its highest judicial court. *Shultz* v. *Moore*, (1 McLean, 524); *Green* v. *Neal*, (6 Peters, 291); *Bank of United States* v. *Longworth et al.* (1 McLean, 35); *Livingston* v. *Moore*, (7 Peters, 542); *United States* v. *Ringgold*, (8 Peters, 160); 1 Story's Laws of United States, 76, Act of April 2, 1790; *Bas et al.* v. *Steele*, (3 Wash. C. C. Rep. 381); *Swift* v. *Tyson*, (16 Peters, 1); *Jackson* v. *Chew*, (12 Wheaton, 153.) Courts in bankruptcy have admitted the principle. 5 Law Rep. 59, 61, 506, 393, 365, 357, 361, 445; 6 Law Rep. 314, 351, 446, 109; *Ex parte City Bank of New Orleans*, (7 Law Rep. 564, 565); *Kilburn* v. *Lyman*, (6 Metcalf, 299.)

Upon this point we may be permitted to advert also to the opinion of Hon. J. Mason, upon the determination of *Kittredge* v. *Warren*, that the decision of the state court was conclusive upon the subject of attachments; and the court well know the weight which attaches to the opinions of that eminent jurist. The authorities cited in *Ex parte Foster*, do not sustain the decisions of the circuit court. Nor do the reasons given there sustain those decisions. See

1 Story's Laws of United States, 550, 1798, ch. 92, sec. 16; 2 Story's Laws of United States, 1334, 1813, ch. 16, sec. 28; Ibid. 1813, ch. 55, sec. 6; *Davidson* v. *Clayland*, (1 Har. & Johns. 546); *Hull* v. *Smith*, (1 N. Y. Legal Observer, Oct. 1, 1842); 1 Story's Laws of United States, 541, July 11, 1798, ch. 88, sec. 15; *United States* v. *Graves*, (2 Marshall's Decis. 381); *Dutton* v. *Morrison*, (17 Vesey, 201); *Ex parte Freeman*, (1 Ves. & Bea. 41); *American Exchange Bank* v. *Morris Canal and Banking Company*, (6 Hill, 366, 367); *In re Reed* v. *Prentiss*, (3 N. Y. Legal Observer, 266, June, 1845); *Buxton* v. *Mardin*, (1 Term Rep. 80.) This court is the exclusive judge whether it can render judgment to be levied of a particular portion of the defendant's estate. *Steward* v. *Dunn*, (11 Meeson & Welsby, 63); 1 Term Rep. 81, cited above.

III. What is the effect of the order of the district court of the United States for the district of New Hampshire, as stated in the defendant's rejoinder? 1. It does not purport to control the real estate. 2. The district court sitting in bankruptcy, or as a court of equity, has no jurisdiction to control the courts of this state, or its executive officers. This general position, *quoad* the court, is admitted in many cases. *Ex parte City Bank* admits it. Does the protection extend to the clerk, and to the sheriff, while in court? If not to be seized here, the shield of this court does not lose its power, and the clerk and the sheriff are as free as the court. 2 Story's Eq. 66. If this jurisdiction reaches the parties, the clerk and the sheriff, the court is not saved. See 2 Story's Eq. 176, 177; *Ex parte Bellows & Peck*, (7 Law Rep. 131); *Aston* v. *Heron*, (2 Mylne & Keene, 390.) 3. The property, at the time of Howland's petition to the district court, for the order relied upon, was *in custodia legis*, and consequently could not be reached by the district court, or its officers. *Ex parte Bellows & Peck*, (7 Law Rep. 131); *Harris* v. *Dennie*, (3 Peters, 291); *Atlas Bank* v. *Nahant Bank*, (23 Pick. 488); *Hubbard* v. *Hamilton Bank*, (7 Metcalf, 340.) The property cannot be subject to two jurisdictions at the same time. The attachment under the state authority withdraws it from the reach of the process of the district court. *Hagan* v. *Lucas*, (10 Peters, 400.) 4. A court of equity has no jurisdiction where the party seeking its aid has an adequate remedy at law. Jeremy's Eq. 338. Here is adequate remedy, by sale, by suit, by defence here, and appeal by error to the supreme court of the United States. 5. Jenness and others, the attaching creditors, were not parties to the proceedings before the district court, and not bound by its order. *Marshall* v. *Beverley*, (5 Wheat.

313); *Coun* v. *Penn*, (Ib. 424); *Russell* v. *Clark*, (7 Cranch, 69); *Mechanics Bank of Alexandria* v. *Seton et al.* (1 Peters, 306.)

The rejoinder is a departure. If an attachment is a lien, this proceeding cannot divest it. This is an attempt, in fact, to overrule and control the judgment of the courts of the state, in a case rightfully before them. 2 Marshall, 381. The state court acquired jurisdiction of the parties and the property, and by subsequent proceedings, in a foreign tribunal, an attempt is made to divest this jurisdiction. But if the district court cannot control the court here, can it control its officers, seize upon its exchequer, take the property, and leave the court here to pronounce a judgment which is to act upon nothing? The order is void for want of jurisdiction. *Shriver's Lessee* v. *Lynn*, (2 Howard, 43); *Thompson* v. *Tolmie*, (2 Peters, 163.) Courts having concurrent jurisdiction cannot be ousted by proceedings in another court. *Stearns* v. *Stearns*, (16 Mass. 171.) A judgment which is void may be impeached by third persons, to whom it is prejudicial, by plea and proof. *Downs* v. *Fuller*, (2 Metcalf, 135); *Smith* v. *Rice*, (11 Mass. 507); *Davol* v. *Davol*, (13 Mass. 264.)

Thus far I have argued upon an admission as to the jurisdiction of the district court broader than it has. I submit that it has no jurisdiction over parties not claiming under the bankruptcy, and that a creditor who does not prove is not subject to its action — that it cannot enjoin parties from prosecuting their suits, rightfully commenced, in a state court — that it has no jurisdiction in equity, except as auxiliary to its bankrupt jurisdiction, restricted as above.

The jurisdiction depends upon the sixth section. There is no new jurisdiction in the eighth. See *Ex parte Pease*, (1 Rose, 242); S. C. (19 Ves. 46); *Ex parte Botcherley, in re Whitehead*, (2 Glynn & James, 369); *Ex parte Timbrell, in re Brown*, (Buck, 105); Archbold on Bankruptcy, 350. This question of jurisdiction is not foreclosed by *Ex parte City Bank of New Orleans*. That decision was not unanimous. Much of the opinion is extra judicial. Moreover the City Bank had become party to the bankruptcy, and its proceedings were instituted after the bankruptcy, facts which do not exist here. The reasons of that opinion are insufficient. If congress had designed to confer such jurisdiction they would have said so, and not left it to be argued out. The rights of debtor and creditor are peculiarly matter of state regulation. The proceedings may extend beyond two years, for suits may be brought up to that time. The limitation in the sixth section escaped the

court. The case admits that the state courts may proceed, unless stopped.

IV. The proceedings in bankruptcy, as exhibited in the several pleas of the defendants, are void, for want of jurisdiction in the court which entertained them. 1. The several petitions of Peck & Bellows, to be declared bankrupt, are not verified by the oaths of the petitioners. The statute prescribes this, and without such petition the jurisdiction cannot be exercised; it does not exist. *Ex parte Bollman & Swartwout*, (4 Cranch, 75); *Sharp et al* v. *Speir*, (4 Hill's N. Y. Rep. 76); 2 Christian's Bankrupt Law, 20, 22; Cooper's Bankrupt Law, 165; *Buckland and others* v. *Newsame*, (1 Taunt. 477); *Alderman Backwell's Case*, (2 Ch. Cases, 191); *Sackett* v. *Andros* (5 Hill's N. Y. Rep. 330); *Elliot et al* v. *Peirsoll*, (1 Peters, 328); *Stephens* v. *Ely*, (6 Hill, 608); Archbold on Bankruptcy, 346; *Thatcher* v. *Powell*, (6 Wheaton, 119.) 2. The several petitions for the benefit of the act, do not aver that the petitioners owed debts not contracted in any fiduciary capacity. He who would avail himself of the act must aver that he owes debts of the character embraced by it. 1 Chitty on Plead. 223, 9th Am. 7th Lond. ed.; Archbold on Bankruptcy, 9. So is the form used in Maryland. See also Owen on Bankruptcy, 25; *Wheeler* v. *Townsend*, (3 Wend. 247); *Wyman* v. *Mitchell*, (1 Cow. 316); *Frary* v. *Dakin*, (7 Johns. 79.) Twenty days notice at least, as the act requires, of the hearing, upon the several original petitions, to be declared bankrupt, was not given. The plea says due notice. *Sharp* v. *Johnson*, (4 Hill's N. Y. Rep. 92); *Lessee of Walden* v. *Craig's Heirs*, (14 Peters, 154); *Stockton* v. *Hasbuck*, (10 Martin, 472); *Young* v. *Capen*, (7 Metcalf, 289); *Slacum* v. *Simms*, (5 Cranch, 363.)

V. The several original petitions do not aver an insolvency of the firm, and they pray no decree against the firm. And the decrees thereon, so far as the same could legally be made, do not subject the partnership property to the action of the bankrupt statute. The property of a bankrupt passes by the decree. An individual decree passes individual property only. The petitions in this case present no issue as to the insolvency of the firm, and no notice has ever gone forth of the alleged insolvency of the firm, or of any proposed decree against them as such. *Taylor* v. *Fields*, (4 Ves. 396); *Ex parte Ruffin*, (6 Ves. 126); *Young* v. *Keighly*, (15 Ves. 557); *Ex parte Peake, in re Lightoller*, (1 Mad. Ch. Rep. 191); Ram on Law of Assets, 792, *et seq.*; *Ex parte Rowlandson*, (1 Rose, 419); *Campbell* v. *Mullett*, (2 Swanston, 551, 575); *Egbert* v. *Wood*, (3 Paige, 517.) Upon this point see also *Barker* v.

Goodair, (11 Ves. 78); *Dutton* v. *Morrison*, (17 Ves. 201); S. C: (1 Rose, 213); *Brickwood* v. *Miller*, (3 Merivale, 279); *In re Waitt*, (1 Jacob & Walker, 585); *Ex parte Farlow*, (1 Rose, 421); *Caldwell* v. *Gregory*, (1 Price, 119); *Harrison* v. *Sterry*, (2 Rose, 149; 5 Cranch, 289); 1 N. Y. Legal Observer, 6, and 40, 41; Ibid. 327; *Gibson* v. *Stevens*, (7 N. Hamp. Rep. 352); *Morrison* v. *Blodgett*, (8 N. Hamp. Rep. 238.) The court cannot decree more than is prayed for. *Shriver* v. *Lynn*, (2 Howard, 43.)

Parker, C. J. Several objections have been raised to the pleas filed in the original action, which we do not find it necessary to consider. They have been urged with great force and ability, and some of them would seem to be fatal, unless the replications are construed as admitting the validity of the discharge generally, by praying judgment against the property. The plaintiffs were entitled to such a judgment, only upon the ground that the defendants had a discharge in bankruptcy, and that such special judgment was necessary to enable them to avail themselves of their lien or security upon the property attached. Perhaps, under this state of the pleadings, the alleged defects in the pleas, if they exist, should be regarded as omissions in matters of form, of which the plaintiffs cannot take advantage in this case; but the consideration of these questions may be waived.

We have already settled, so far as our decision can settle the question, not only that an attachment upon mesne process constitutes a lien, by the laws of this state, but that it is also a lien or security upon property, within the saving clause of the second section of the bankrupt act, of August 19th, 1841. It is not necessary, therefore, to enter into a further discussion of that subject; but we may remark that were further matter in support of that conclusion desirable, it is found in the additional authorities to which we have been referred, by the industry and research of the counsel for the defendants in error, in the present case.[1] Without

[1] See also *Winsor* v. *McLellan*, (2 Story's C. C. Rep. 495,) and *Fletcher* v. *Morey*, (Ib. 564,) to the point that the assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt. It is clear that the bankrupts, prior to the assignment, held it subject to the attachment. See farther, *Fiske* v. *Hunt*, (2 Story's Rep. 582,) and *quere* whether there was any laches of the bankrupt, or his assignee, in that case, which should prejudice the rights of the creditors, or distinguish the case from that of *Ex parte Foster*. "In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and

pursuing that part of the subject farther, we proceed to consider whether the rejoinder, which sets forth an order of the district court, upon the sheriff, to deliver up the property to the assignee, takes this case out of the principle of the cases decided in this state.

The rejoinder does not state that there has been any compliance with the terms of that order, and it may, therefore, be inferred that the property attached is still in the hands of the sheriff, and in the custody of the laws of the state. Since the decision of *Kittredge* v. *Emerson*, the case *Ex parte City Bank of New Orleans*, (reported 7 Law Rep. 553,) has been determined in the supreme court of the United States, and the plaintiffs in error rely upon the opinion delivered in that case, as sustaining the present suit. That case settles nothing in relation to attachments or liens. There is nothing in it in conflict with our decision in *Kittredge* v. *Warren*, nor with so much of the opinion we expressed in *Kittredge* v. *Emerson*, as relates to those subjects. Assuming the doctrine of those cases, that an attachment is a lien or security upon property, within the proviso of the second section of the bankrupt act, to be correct, it is not perceived how the order of the district court, unexecuted, could affect the right, or the duty, of the state court, to render judgment and enforce the security. The property remained in the hands of the sheriff, under the attachment, and the court had the power to render a judgment which would preserve and give effect to the security which the creditors had obtained by it.

The abstract of the case *Ex parte City Bank of New Orleans* contains these propositions, — "The jurisdiction conferred on the district courts by the sixth section of the bankrupt act, over all cases and controversies between the bankrupt and his creditors, and between the creditors and the assignee, is not limited to creditors who prove their debts in bankruptcy, but extends to all whose debts constitute present subsisting claims, capable of being asserted in any form under the bankruptcy." "The district courts possess full jurisdiction to suspend and control proceedings in the state courts, instituted by any creditor or party adversely interested, to

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this lien is as absolute before the levy, as it is afterwards. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff." *Lessee of Waller* v. *Best*, (3 Howard's Sup. C. Rep. 111.) Surely an attachment in New England binds the property attached as much as the delivery of a *fi. fa.* to the sheriff in Kentucky binds the personal property there. See also the opinion of Mr. Justice Baldwin, in the matter of *John Kerlin*, a bankrupt, (cited 3 Howard's Rep. 327.)

enforce his rights or obtain remedial redress against the bankrupt or his assets, by acting upon the parties through the instrumentality of an injunction or other remedial proceedings in equity, upon application by the assignee, and a proper case for such interference made out." "The prosecution or defence of any such proceedings in the state courts is placed under the discretionary authority of the district courts." (7 Law Rep. 553, 554.)

Assuming the doctrine thus quoted to be sound, and that the district court may control proceedings in the state courts; the order set forth in the rejoinder does not attempt so to do, unless it be supposed that the delivery of the property would defeat the suit, which certainly does not necessarily follow. The order does not stay the suit, and as the district court, if it took possession of the property, would be bound to enforce the security, and apply the property in satisfaction of the debt if one existed, the obvious mode in which to ascertain whether a debt existed, and to ascertain its amount and enforce the security if it existed, would be to permit the creditor to proceed to judgment in the suit by which the security was obtained, and through which from its very nature, it was, by the laws creating it, to be enforced. The district court, if it had a right to control the proceedings, must take some measures to satisfy the lien. What those measures should be, unless to direct the plaintiff to ascertain the amount of his debt by a judgment and to apply the property in satisfaction of it when rendered, does not appear. A question might certainly arise, if the suit were to be defeated, how the lien or security, which originated upon the service of the writ, (and according to the law of the state was dependent upon the prosecution of the suit, and the rendition of a judgment,) is to be preserved and enforced. The case *Ex parte Foster*, certainly seemed to look to the destruction of the suit, by pleading the discharge, as an effectual means of defeating the lien or security which was dependent upon it. If the district court had authority to make the order, was bound to enforce the lien, and might control the proceedings in the state court; it would seem that removing the property subject to the security, it should remove the suit on which the security depended — should remove the principal, as well as the incident.

But we do not place our decision, in this case, upon these considerations. Those portions of the opinion in *Ex parte the City Bank of New Orleans*, of which we have cited the abstracts, claim from us some farther examination. That case decides that "the supreme court possesses no revising power over the decrees of the district courts, sitting in bankruptcy;" and that it "is not author-

ized to issue a writ of prohibition to the district courts, except in cases where they are proceeding as courts of admiralty and maritime jurisdiction. So far as this, it is matter of authority. Those were the points in issue in the case; which was an application for a writ of prohibition. Other matters were discussed at the bar, and were involved in the previous proceedings in the district court, but the decision of those matters was in no way necessary or important to the conclusion that the supreme court had no power to issue a writ of prohibition. And upon that part of the case, which is the part upon which the plaintiffs in error rely, we may say that we do not feel required to receive, and for reasons which we shall state, we cannot take the particular views expressed in the opinion delivered, as matter of authority, decisive of this case.[1]

That part of the case relating to the jurisdiction of the district courts, of which we have already cited the material portions of the abstract, as published in the Law Reporter, is not upon the principal points involved in this case, which are, the authority of the district court to issue this order upon the sheriff to deliver the property, and its effect. If it be supposed that the district court had the right to issue the order, the effect of it upon this suit remains to be settled. It has been argued here, that that case does not decide the question whether the district court had the right to make an order on the sheriff to deliver the goods, so long as they were in his custody under the laws of the state. The bench of the supreme court at the time of the delivery was not full, and it is understood that the court were not unanimous in the opinion delivered.[2] The course of reasoning in an opinion, and incidental positions not necessary to the decision of the case, do not always receive the sanction of all the members of the court, even when no dissent is expressed; and although entitled to great respect, this consideration might be sufficient to show that such reasoning and conclusions, upon collateral points, do not, under such circumstances, come to us with the weight of a binding authority.

But there is still another and a conclusive reason why we cannot receive the part of the opinion to which we have referred, as a guide to direct our judgments, and that is, that we cannot reconcile the different portions of it, so as to regulate our action according to it. In one portion it seems to take from the state courts all

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[1] See the opinion of Mr. Justice Catron, (3 Howard, 322.)

[2] Two judges, at least, dissented. See the case reported, 3 How. Sup. C. Rep. 326. And see also the opinion of Mr. Justice Baldwin, in the matter of *Kerlin*, there cited, and adopted by Mr. Justice Catron.

jurisdiction of any suit against the bankrupt, after a decree in bankruptcy, by asserting an exclusive jurisdiction in the district and circuit courts over all such cases. And in a subsequent portion it expressly admits the jurisdiction of the state courts over such suits, and their authority to render valid judgments, but asserts a superior jurisdiction in the district court to suspend or control those proceedings at its will, making the jurisdiction of the state courts, in fact, subservient to that of the district court. It has heretofore been supposed that the language of the sixth section of the act, providing that the jurisdiction conferred by it on the district court "shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy," &c. was limited to such creditors as came in and proved their debts under the bankruptcy, or instituted some proceedings, relying upon the fact of bankruptcy to sustain them, or having reference to the petition. Such was substantially one of the objections taken in the argument of the case of the City Bank. But that position seems to have been distinctly denied. It is said — "We do not so interpret the language. When creditors are spoken of "who claim a debt or demand under the bankruptcy," we understand the meaning to be, that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy, in any manner and form, which the creditors might elect, whether they have a security by way of pledge or mortgage therefor, or not." (7 Law Rep. 563.) This seems to lie at the foundation of the opinion in that case, except so far as the matter of prohibition is concerned.

The great question, which in fact is the basis of all the rest, is this, what is the jurisdiction of the district court? And this depends upon what is comprehended within the terms "in bankruptcy," "under the bankruptcy," and "in virtue of the bankruptcy." The district court had jurisdiction of "all cases and controversies in bankruptcy," where creditors claimed "any debt or demand under the bankruptcy," and of "all acts, matters and things to be done under and in virtue of the bankruptcy." The opinion extends the construction of these terms, so as to embrace not only all debts and demands of creditors who actually assert a claim, in some mode having for its foundation the petition and decree of bankruptcy, and the jurisdiction of the district court consequent thereupon; but, as we have just seen, to all debts and claims capable of being so asserted; and it makes this an exclusive jurisdic-

tion in the district and circuit courts; for in another part of the opinion, referring to the eighth section of the act, and the concurrent jurisdiction, there conferred upon the circuit court, of all suits which may or shall be brought by any assignee of the bankrupt against any person claiming an adverse interest, or by such person against the assignee, &c. we find it said — "of course, in whichever court," (circuit or district,) "such adverse suit should be first brought, that would give such court full jurisdiction thereof, to the exclusion of the other. But in no shape whatsoever can this clause be construed otherwise to abridge the *exclusive jurisdiction* of the district court over all other "matters and proceedings in bankruptcy arising under the act, or over all acts and matters and things, to be done under, and in virtue of the bankruptcy." (7 Law Rep. 562.) And again — "Prompt and ready action, without heavy charges or expenses, could be safely relied on, when the whole jurisdiction was confided to a single court, in the collection of the assets, in the ascertainment and liquidation of the liens and other specific claims thereon, in adjusting the various priorities and conflicting interests, in marshalling the different funds and assets, in directing the sales at such times and in such a manner as should best subserve the interest of all concerned, in preventing, by injunction or otherwise, any particular creditor, or person having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors by an improper use of his rights, or his remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public, as well as private interests, manifestly dictated to congress the propriety of vesting in the district court full and complete jurisdiction over all cases arising, or acts done, or matters involved in the due administration and final settlement of the bankrupt's estate; and it is accordingly, in our judgment, designedly given by the sixth section of the act." (7 Law Rep. 570. See also page 568.)

If then by "creditors who claim any debt or demand under the bankruptcy," all creditors are in fact intended, whose "debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy;" and if the debts and demands against the bankrupt, capable of being so asserted, are to be deemed debts and demands "under the bankruptcy," as they must be in that case; the conclusion seems to follow, that the district and circuit courts have exclusive jurisdiction of all such debts and suits. The opinion, as

we have shown distinctly, asserts this, and we have no doubt that the act confers upon the courts of the United States, exclusive jurisdiction of all suits and proceedings "in bankruptcy." The necessary result of this doctrine must be, that the jurisdiction of the state courts, over any debt or demand capable of being asserted under the bankruptcy, would be ousted by the decree of bankruptcy. They would not have a right to enforce any lien or mortgage, or to entertain jurisdiction of any suit or demand, fiduciary or otherwise, capable of being proved under the bankruptcy; for such demand or suit would be a demand and proceeding under the bankruptcy, and in bankruptcy, and therefore within the exclusive jurisdiction of the district court, or the exclusive concurrent jurisdiction of the district and circuit courts. On this hypothesis, no injunction would be necessary to restrain proceedings in the state courts. All such proceedings, after the decree of bankruptcy, would be without jurisdiction, and might well be treated as nullities.

But a position, that the state courts have no jurisdiction over debts and demands capable of being proved under the bankruptcy is entirely inconsistent with the bankrupt act, with *Ex parte Foster*, *Ex parte Bellows & Peck*, and even with other portions of *Ex parte the City Bank of New Orleans*, for it is there admitted that the courts of a state may entertain jurisdiction of suits upon such debts. The opinion is explicit upon that point. Speaking of the asserted jurisdiction of the district court to suspend or control proceedings in the state courts, brought by any creditor or person having an adverse interest, it is said, — "But because the district court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should, in all cases, be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the district court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of any fraud or injustice on the part of the plaintiff in those suits. The act itself contemplates, that such suits may be prosecuted, and further proceedings had in the state courts." (7 Law Rep. 567.) And the reason why injunctions have been granted to stay proceedings in the state courts has been, that the rights of the assignee, and of the other creditors, would be concluded by a judgment obtained there in favor of any particular creditor.

The jurisdiction of the state courts over debts capable of being proved under the bankruptcy, being admitted, the inquiry arises how has this jurisdiction been obtained. It is very clear that it was not conferred by the bankrupt act. That does not purport to confer any jurisdiction, in bankruptcy, upon the state courts, and a question might have arisen, whether it could have done so, had congress attempted it. *Martin* v. *Hunter's Lessee*, (1 Wheaton's R. 337.)[1] It neither enlarges nor limits their jurisdiction. The authority to the assignee to prosecute and defend, given by the act, admitting that it may be exercised in the state courts, is not a grant of jurisdiction to those courts over the subject-matter, but authorizes the assignee to resort to such jurisdiction as they may have had before, in consequence of the transfer of all the rights and property of the bankrupt to him, and of the duties thereby devolved upon him. The jurisdiction of the state courts, it is not to be doubted, is derived from the laws of the several states in which they are situated. It existed before the passage of the bankrupt act, and it is entirely independent of it, although the provisions of the act must be enforced, as the paramount law, in all cases where they come in question in the administration of the ordinary jurisdiction. The bankrupt act neither purports to interfere with the exercise of the jurisdiction conferred by the laws of the several states, upon the state tribunals, nor to authorize the courts of the United States to interfere with it, except in such manner as is provided by the general laws in other cases. There is no provision to be found purporting to give any such authority. In this view of the matter, creditors of a bankrupt having claims, capable of being asserted in the state courts, are left at full liberty to resort to those jurisdictions, and to pursue their remedies there, notwithstanding those claims are debts capable also of being asserted under the bankruptcy.

But as the jurisdiction in such cases was conferred by the state laws, existed before the passage of the bankrupt act, and was not limited or enlarged by that act, it will follow that it is not a jurisdiction in bankruptcy; that the creditors who resort to it, by suit, are not creditors "who claim a debt or demand under the bankruptcy;" and that the proceedings had upon their claims are not matters and things done "under and in virtue of the bankruptcy." How then is it made to appear, that "the prosecution or defence of such suits in the state courts is obviously intended to be placed under the discretionary authority of the district court?" The

[1] See 2 Story's C. C. Rep. 656.

right to control the bankrupt, and the assignee, obviously gives no such power. It must be derived from the doctrine that the proceedings in the state courts are proceedings in and under the bankruptcy, of which the district court has jurisdiction, although the case is pending in the court of another government, or it must be founded, as we have heretofore supposed it was, upon some alleged necessity of the case. If proceedings under the bankruptcy are confined to those which have for their object the collection and distribution of the assets among the persons who claim as creditors of a bankrupt, and those proceedings which are incidental to, and subservient to that object, the prosecution of suits by creditors claiming adversely to the bankruptcy, does not come within that description; and creditors may waive their rights under the bankruptcy, and take such other remedy in the courts of the state as the forms of proceeding there will allow, the bankrupt act being regarded, like other laws of the United States, as the paramount law, so far as it applies to each particular case. The assignee being appointed under the bankruptcy, the district court has jurisdiction over him, and may control him in the prosecution or defence of any such suit; but the adverse party, who claims nothing under or by virtue of the bankrupt act, and the court upon which the act confers no jurisdiction, with its officers, stand upon a different ground.

For the reasons suggested, we have thought that the different portions of the opinion to which we have adverted, the one alleging that all creditors having present debts capable of being asserted under the bankruptcy, are creditors "who claim a debt or demand under the bankruptcy," and the other admitting the jurisdiction of the state courts over demands thus capable of being asserted and proved under the commission, cannot stand together; and we have had to choose between them. The first, so far as we are aware, is new, and in our judgment not warranted by the phraseology of the act. It ousts, in our view, as we have said, the jurisdiction of the state courts, over all debts capable of being proved under the commission. The latter has not only been acted upon everywhere, but has been fully sustained by the district court and supreme courts of the United States, in the cases referred to, and is admitted in the language of the act itself.[1]

Adopting the position that the state courts have a jurisdiction over such cases, not founded upon the bankrupt act, or the bankruptcy, we conclude that mortgages and liens saved by the act

[1] See also *Norton's Assignee* v. *Boyd*, (3 Howard, 436, 437.)

may be enforced under it; and discharges may be pleaded, or other defence made under the laws of the United States, or the state. But injunctions or orders cannot be issued by the district courts to stay proceedings or defeat the jurisdiction, because that court has no supervisory jurisdiction by the bankrupt act, and because injunctions are prohibited by a general law of the United States, and the case of a bankrupt furnishes no exception to that law. And congress having neither conferred nor limited the jurisdiction of the state courts, the plea that it is necessary to interfere with and control the exercise of that jurisdiction, on account of any of the requirements of the bankrupt act, cannot avail, because the act contemplates no such necessity; and it is evident that no such necessity exists, because the act must have been administered in Pennsylvania, and in Vermont, since the decision of *Downer* v. *Brackett*, (5 Law Rep. 392,) without any such interference.[1] The judgment in the state courts against a bankrupt, rendered in pursuance of their jurisdiction, must have the same faith and credit as is given to their judgments in other cases where they have jurisdiction, and may be enforced by the court rendering it in the same manner. And if a judgment is founded upon an erroneous construction of the bankrupt act it may be reversed.

It is not necessary to deny that congress possesses the power to confer an authority such as is claimed. It is sufficient that that body has not attempted its exercise. Cases may undoubtedly be put to show that a power to restrain and control proceedings in the courts of the states would enable the courts of the United States to administer their jurisdiction more conveniently; but those extreme cases neither confer authority on the courts of the United States, nor take away that existing in the state courts. Much less can they show a repeal of a positive prohibition upon the former.

In the view we have taken of the case, it is hardly necessary to say, in conclusion, that we are of opinion that the order of the district court, set forth in the rejoinder, imposed no duty upon the sheriff, and that it furnishes no answer to the replication.

Judgment affirmed.

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[1] See the opinion of Mr. Justice Baldwin, cited 3 Howard's Rep. 331.

District Court of the United States for the Southern District of New York. In Admiralty.

THE MUTUAL SAFETY INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY AND THE JACKSON MARINE INSURANCE COMPANY *v.* THE CARGO OF THE SHIP GEORGE, AND THE PROCEEDS THEREOF — REYER & SCHLICK, OF TRIESTE, JOSIAH MACY & SON, GEORGE BARCLAY AND SCHUYLER LIVINGSTON.

General average contribution.

THIS case was recently argued and determined in the New York U. S. District Court, and though we have not been able to obtain the opinion of the learned judge, (Betts,) by whom it was decided, still, as the matter is of very considerable consequence to the mercantile community, especially to those interested in the law of insurance, and as the grounds of the decision substantially appear in the decree that was entered, we have thought it not inexpedient to give the best report of the matter in our power.

The suit was commenced by three insurance companies, underwriters on cargo and freight, by a libel filed to recover the share of general average alleged to be due them, by certain cargo shipped on board the ship George, on account of a voluntary stranding of the vessel to save it from foundering in consequence of a leak at sea. The underwriters had accepted an abandonment and paid a total loss on the vessel and freight.

The George being insured by the libellants, (all the three companies having underwritten the vessel to the valued amount of $12,000 — $4000 each, and one of them, the Mutual Safety Insurance Company having underwritten the freight to the amount of $4400, on a valuation of $6800,) sailed in May, 1841, from New Orleans for Trieste, with a cargo of cotton, consigned to the respondents, Reyer & Schlick. When about six days out the vessel met with heavy weather, and sprung a leak. The leak increased, and the captain, after making a fruitless attempt to make the harbor of Nassau, finally, in order to save the vessel and cargo from foundering, ran the George on shore on a reef about three quarters of a mile from the shore at the west end of the Grand Bahamas.

The vessel and freight were wholly lost, the former being sold as a hulk for a trifle, and after abandonment to the underwriters a total loss was paid by them. A large portion of the cotton was

saved, and the proceeds came to the hands of the defendants, Macy & Son, on account of Reyer & Schlick, the owners or consignees. This libel was filed on the ground that the proceeds of the cargo were bound to contribute in general average to the loss of the vessel and freight. A foreign attachment was prayed for against the defendants, Reyer & Schlick. There was little dispute on the facts. The answer of Barclay & Livingston, the agents of Reyer & Schlick, insisted that the vessel was run on shore to save the lives of the master and crew, and that the most expedient course had not been pursued in running the vessel on shore. The answer of J. Macy & Son admitted the fund in their hands. The only witness examined was Thomas S. Minott, master of the George. He testified, that between the 17th and 22d of May the leak had averaged from two hundred to twelve hundred strokes per hour, that the water was four feet in the hold, and increasing, when he determined, on the 28th, to run her ashore. The wind was light with little sea. He testified positively that he ran the vessel ashore to save vessel and cargo, and that he did not consider any life in danger, as they had good boats, and the weather was moderate. That if the cargo had been thrown overboard, the leak might have been stopped, if it was in the upper works, but he did not know where it was. That he thought there was a chance, although a small one, of keeping the vessel free, even without running her ashore or throwing over cargo. That he selected the place of running her ashore with the view, and in the hope of saving both ship and cargo.

On this state of facts, the respondents insisted upon *Bradhurst* v. *The Columbian Insurance Company*, (9 Johns. R. 39,) that the vessel being lost no contribution was due. But the court, on the authority of *Columbian Insurance Company* v. *Ashley*, (13 Peters, 331,) held otherwise, and the following decree was entered[1] in favor of the libellants:

"This case having been heard upon the pleadings and proofs, and having been argued by Mr. Sedgwick for the libellants, and by Mr. Lord for the claimants, and due deliberation being had in the premises, it is considered by the court, that the libellants are entitled to recover against the claimants, and against the proceeds of the cargo owned by them, and saved from the wreck of the ship George, a contributory part in general average in the proportion the value of the cargo saved, bore to the cargo on board paying

[1] The heads of the arguments and reasons of the court will be found in the New York Legal Observer, (edited by *Samuel Owen*, Esq.) for June, 1845, p. 260.

freight. And it is further considered by the court, that, the libellants, for the purpose of such contribution, are entitled to have the ship and freight valued at the sums respectively named in the policies in the pleadings mentioned, deducting in respect to the ship a reasonable allowance for tear and wear on the voyage up to the time of the disaster, and all sums received on sale thereof, or any part of her tackle or apparel, at the place of wreck or elsewhere. And it is further considered by the court, that the goods of the claimants saved, pay contribution according to the prices at which the same were sold at Nassau, deducting therefrom, salvage and other necessary charges, and if it be found that such prices are below the average invoice prices of said goods, or the valuation thereof in the policies of insurance, that, then the residue of the cargo paying freight be valued for the purpose of adjusting the average contribution, at the same rate or proportion. And it is ordered by the court, that it be referred to the clerk, (or to an auditor to be named and designated by consent of the proctors of the respective parties,) to adjust and state the average contribution against the claimants, conformably to the principles of this decree, and that on such reference, the testimony used in this cause, and such other evidence as may be pertinent and competent, may be offered by either party, subject to all legal objections."

On the question of adjusting the average contribution, a new controversy arose between the parties. The hull of the vessel had been sold after the disaster on the beach for a small sum — about two-thirds of the cargo were lost — one-third only saved. The interests to be contributed for were, (1.) the vessel represented by the underwriters on vessel, and valued at $12,000; (2.) the freight represented by the underwriters on freight to the extent of the insurance, $4400, and by the owners of the vessel for the balance; (3.) the cargo lost.

The interests to contribute to make up this loss were, of course, as to vessel and freight the same, and the entire cargo. The rate at which the vessel and freight should contribute was the subject of the difference of opinion. The insurers on the vessel contended, on the authority of the case of *Leavenworth* v. *Delafield*, (1 Caines, 573,) and on what they asserted to be uniform custom, that to determine the wear and tear of the vessel one-fifth should be deducted, and the vessel be contributed for upon the balance, or four-fifths. The insurers on freight contended, on the authority of the same case and custom of alleged similar generality, that the freight should only

contribute on one-half its gross amount, or in this case $3400, and be contributed for on the whole — the reason of this rule being stated to be the propriety of making a deduction for the expense of earning the freight; and lastly, the underwriters, whether on vessel or freight, contended that the valuations in the policies were to govern.

In the case above cited, the following language was held by Livingston, J., in the Supreme Court of New York: — After citing Pothier and Marshall, he proceeds, p. 579 — "As the rule is not accurately defined by the law of England, and the one adduced applies to cases of jettison only, we are at liberty to make one for ourselves. The injustice of making the ship and freight contribute for their full value has already been stated. The first will be injured by the voyage, and oftentimes the whole freight received will not be equal to the disbursements and expenses to which the owner has been exposed. . . . . What value to put on the vessel and freight, and do complete justice, is more difficult, perhaps impracticable. To take their full worth will not do. After the best reflection I have been able to bestow on the subject, I am for valuing the vessel at four-fifths of her original cost — reckoning nothing for provisions or wages paid in advance, and the freight at one half of the gross sum agreed to be paid. This rule may be deemed arbitrary. So will any that can be devised, and yet, perhaps, it will come as near as any other in producing a contribution in proportion to the real interest of each which may be in jeopardy."

For the respondents it was insisted, that this case of *Delafield* v. *Leavenworth*, did not apply to the present; that the valuations in the policies could not affect third parties, that is, the owners of cargo; that the actual wear and tear of the vessel should be ascertained by evidence, not by any arbitrary deduction, and that the freight should contribute on its whole gross amount.

The cause was argued at length before Betts, D. J., at New York, by *Theodore Sedgwick* and *John Duer*, for the libellants; and by *Daniel Lord*, jr., for the respondents, and the following decree pronounced:

"This cause having been further heard in respect to the form of the order or decree to be rendered therein, and due consideration being had of the premises, it is considered and adjudged by the court, that the libellants recover against the proceeds of the cargo in the pleadings mentioned, a contributory part or general average in proportion of the value of the cargo saved (represented in whole or in part by the said proceeds) bore to the cargo on board paying freight. And it is further ordered and adjudged, that for the pur-

pose of such contribution, the said ship be estimated at her value at her port of departure when the voyage in the pleadings mentioned commenced. Such value to be proved on the part of the libellants, subject to such deduction for wear and tear up to the time of her loss as on the part of the claimants shall be found to be reasonable; and also deducting all sums received by the libellants on sale of said ship, or any part of her tackle or apparel after the stranding in the pleadings mentioned. And it is further ordered and adjudged, that the cargo laden on board be valued for the purpose of contribution, at the prices stated in the invoice and bills of lading thereof, or either if both cannot be produced, deducting therefrom salvage and other necessary charges incurred in consequence of the wreck of said ship. And it is further ordered and adjudged, that the freight of the said ship be contributed for at its gross value, and that the freight saved after the wreck also contribute at its gross value, being the amount contributed for in the general average, deducting therefrom all necessary expenses incurred (if any) subsequent to the wreck aforesaid. And it is further ordered and adjudged, that it be referred to the clerk of this court, (or at the option of the parties to an auditor, to be selected by their respective proctors,) to adjust and state the average in this district, conformably to the directions of this decree, and that on such reference the proof produced on the hearing of the cause, and such other evidence as may be pertinent and competent may be offered by either party, subject to all legal exceptions. And it is further ordered and decreed, that on the coming in and confirmation of the reports of the clerk (or auditor) the libellants may take and enter a final order, that the claimants, Josiah Macy and others, in the pleadings named, and holding in their hands part of the proceeds aforesaid, pay over to the libellants respectively the sums so reported to be due them, or the ratable portion thereof, according to their respective insurances, with interest thereon from January 10, 1842, to the amount of the said funds in their hands, if necessary for that purpose. And it is further ordered and decreed, that the libellants recover their costs to be taxed, to be paid out of said proceeds, but no decree or process by virtue of the proceedings of foreign attachment, is to be taken *in personam* against any party in the pleadings mentioned."

Under this decree the following adjustment was prepared, and on this the controversy was finally terminated.

STATEMENT OF GENERAL AVERAGE CASE OF THE SHIP GEORGE.

Net proceeds of cargo saved received by Messrs. Josiah Macy & Sons,	$14,046 59
Less commissions charged by them, 2½ per cent.,	315 16
	$13,731 43
Net proceeds of hull and materials,	$466 95

LOSS ON VESSEL, CARGO AND FREIGHT, BY THE VOLUNTARY STRANDING, TO BE ACCOUNTED FOR.

		General Average.
Vessel, valued at	$12,000 00	
off for wear and tear 1-5th,	2,400 00	
	$9,600 00	
Less net proceeds,	466 95	
		$9,133 05
Cargo lost, as agreed upon by the parties,		38,795 57
Freight, valued at		6,800 00
Adjustments of the average,		100 00
General average,		$54,828 62

CONTRIBUTORY INTEREST.

Vessel, amount contributed for,	$9,133 05		
Add net proceeds of sales,	466 95		
		9,600	$7,636 40
Cargo, amount contributed for,	$38,795 57		
Add net proceeds of cargo saved,	13,731 43		
		52,527	41,783 10
Freight as valued,		6,800	5,409 12
		$68,927	$54,828 62

SETTLEMENT.

		To Pay.	To Receive.
Vessel, receives amount contributed for,	$9,133 05		
Less proportion of general average,	7,636 40		
	$1,496 65		
Mutual Safety Insurance Company on ⅓d,			498 89
Jackson Marine Insurance Company on ⅓d,			498 88
American Insurance Company on ⅓d,			498 88
Cargo, pays general average,	$41,783 10		
Less amount contributed for,	38,795 57		
Messrs. Josiah Macy & Sons to pay		2,987 53	
Freight, receives amount contributed for,	$6,800 00		
Less general average,	5,409 12		
	$1,390 88		
Mutual Safety Insurance Company on	$4,500		920 45
Owners of vessel receive on freight not insured, say $2,300.			470 43
Insurance brokers for adjustment,			100 00
		$2,987 53	$2,987 53
Mutual Safety Insurance Company receive on vessel,		498 89	
" " " " " on freight,		920 45	
		$1,419 34	

New York, July 26, 1845.

HENRY W. JOHNSON, Insurance Broker.

It appears by the decree, that all the points raised on the second argument by the libellants were decided against them; that the court held the valuations in the policies to be no proof whatever for the purpose of adjusting the average; that the wear and tear of the vessel should be got at by actual evidence, and that the freight should contribute and be contributed for at the same sum. This case is in some respects purely local, and applies to New York only, the rules of adjusting averages varying very much in the different states. In Massachusetts, for instance, the vessel contributes on her value less two-thirds of the sum necessary to repair her, and the freight contributes on only two-thirds. Everywhere, however, we believe in the Union, an arbitrary deduction is made from the value of the vessel — and by a custom equally general, an arbitrary deduction is also made from the contributory value of the freight. If a new rule is to be established under the high sanction of the courts of the United States, it is very desirable to have it generally known.

Supreme Court of Pennsylvania, September Term, 1845.

ANONYMOUS.[1]

An indorsement by a partner of his separate accommodation note, with the name of the firm, is sufficient notice of the transaction to make it the duty of the bank which discounts it, to inquire into his authority to use the firm name, provided there are no circumstances from which such an authority may be implied.

H., a partner in the firm of H. & E., drew his separate promissory note in favor of J. C. & Co., procured their indorsement of it, added the indorsement of his own firm, and had it discounted. *Held*, that as the transaction was not within the scope of the partnerships business, and as the firm had not been in the practice of indorsing the notes of H. or of J. C. & Co., and had not specially sanctioned the indorsement in the particular instance, the bank's indorsee could not recover on it.

But *held*, that placing the proceeds to the credit of H.'s separate account, was not a circumstance to affect the bank with notice.

WILLIAM L. HALL and CHAUNCEY EASTON, doing business under the firm of Hall & Easton, were partners in a paper mill at North East, Pennsylvania. On the first of November, 1836, Hall drew his promissory note, at three months, in favor of J. Cochran & Co., who indorsed it for his accommodation. He added the indorsement of his own firm without the knowledge of his partner, and

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[1] The *name* of this case is omitted in the MS. sent to us. EDITOR.

had the note discounted at the Lumberman's Bank, which sent it to the Bank of Buffalo, New York, for collection, having placed the proceeds to the credit of his separate account. The note being returned, was indorsed to the plaintiff by the president of the Lumberman's Bank; and the question in the common pleas of Erie county, in which the cause was tried, was whether the bank had been a *bona fide* holder for value. There was evidence that one other note had been previously drawn, indorsed and discounted by the same bank in the same way; but there was no evidence that it had been done with Easton's knowledge. The president charged that, under the circumstances, the bank was bound to ascertain from Easton whether he had assented to the indorsement, and that the plaintiff ought not to recover. The point was argued on a writ of error to this court, by *Babbit* for the plaintiff, and *Walker* for the defendant; and the opinion of the court was delivered by

Gibson, C. J. A partner is clothed with all the authority of his firm to bind it by acts within the sphere of its business; but by no other act can he bind it without the express or implied sanction of his copartners. Where they have given it in terms, there can be no difficulty in applying the principle to particular cases: to deduce it from circumstances is less easy; and little assistance is to be had from decided cases, discrepant as they are, in particulars. Yet it seems easy to rule any case that may occur by attending to the established distinctions. It is not doubted that a partner cannot pay his separate debt with the joint effects, though the creditor may not suspect a misapplication; for the wrong may be redressed without prejudice to any one. The case may be different where partnership paper is paid or pledged for a debt incurred on the faith of it by a partner or a stranger. If it pass into the hands of a *bona fide* holder for value, or be paid to the vendor of an article dealt in by the firm, the debt will be treated as if it had been contracted by the partnership. The difficulty is to determine, in case of a measuring cost, between *bona fides* and *mala fides*. The latter may certainly be imputed to a holder who omits to inquire into the true nature of a transaction which does not fall in with the current of trade; and from the application of this principle to the case before us, there results but one conclusion. The indorsement of accommodation paper is not the ordinary business of a partnership; nor is it a necessary or legitimate incident of it. Doubtless a few merchants have made it a part of their business to indorse for a premium, and thus have taken the risk of the debtor's insolvency; but these transactions have not been sufficiently numerous to constitute

a class. More than this — had the firm before us dealt in this sort of insurance, the fact ought to have been shown in order to make the case an exception. That firms, like individuals, do sometimes step out of their way to accommodate each other, is undoubted; but these acts of original kindness are no part of a merchant's or manufacturer's business. For this we have the authority of *Gansevort* v. *Williams*, (14 Wendell, 139,) in which the subject was fully considered, though the precise point before us was not decided. Now where nothing has been done by a firm to mislead, it is certain that all who deal with it are bound to know the nature of its business; and are consequently to take notice of the authority of its members. On the other hand, it is as clear that it may, by its bearing, give them an implied authority to act in matters beyond the confines of its business. By habitually sanctioning their indorsements for particular houses, it may give them authority to continue the practice, or a master, who sanctions contracts made by his servant, gives him authority to contract debts for him prospectively. There is no proof, however, of precedent transactions like the present. Hall drew the note in question in favor of J. Cochran & Company, procured their indorsement of it, indorsed it with the name of his own firm, had it discounted at the Lumberman's Bank, and had the proceeds put to the credit of his separate account. Being at liberty, as a member of the firm, to dispose of its effects at will, he might check for this money without the consent of the bank which had lost its control over it; and this last feature of the case is consequently an immaterial one, as it was held to be by Lord Eldon, in *ex parte Bonbonus*, (8 Ves. 542.) But that Hall had drawn ostensibly for his separate accommodation, sufficiently indicated that his firm's indorsement was also for his separate accommodation, and made it the duty of the bank to inquire into his authority for the act, as it would have been bound to do had he indorsed the name of the firm on the note of a stranger. The bank, then, and the present holders are affected with knowledge that the transaction was a separate one; and we have the naked case of a note indorsed with the name of a firm, in a transaction out of the line of its business; from which the conclusion is unavoidable, that it was discounted on the faith of an indorsement void for want of previous authority or subsequent ratification. Judgment affirmed.

Supreme Court of Vermont, Windsor County, February Term, 1845.

JOSEPH GRAY *v.* MOSES PINGREY.

Whenever the subject-matter of a suit has been determined in a former trial, between the same parties, that will be a bar to the further litigation of the subject, notwithstanding some formal differences between the present and former action.

Where there is a plea of *nul tiel record*, and an issue to the jury, the issue to the court should be first determined.

In pleas of estoppel, the greatest strictness is required. They should contain all the facts necessary to create the estoppel, alleged with the greatest certainty. It should further appear upon the face of the plea, that all these facts appear of record; and the plea should conclude by relying upon the estoppel.

The form of pleading an estoppel in *Shelly* v. *Wright*, (Willes R. 9,) approved. The defence of a former recovery need never be pleaded as an estoppel, but is an equitable defence, and in many actions may be given in evidence under the general issue; and where required to be pleaded in bar, is not required to be pleaded with greater strictness than any other plea in bar.

It is not essential to the defence of a former recovery, that the former suit should have been determined in favor of the plaintiff, but only that the trial should have been upon the merits.

But when the former trial is relied upon as settling some collateral fact, it must be pleaded strictly, as an estoppel, and the record vouched in support of the plea must contain, upon its face, all the essential proofs necessary to create the estoppel.

Whether, when a former determination is relied upon as evidence, it is really to be considered any less conclusive, than when pleaded as an estoppel—*Quære.*

THIS was a complaint against the defendant for forcible detainer, under that section of the Revised Statutes, which gives the lessor of land a right to take proceedings against his tenant, before a justice of peace, in case he "wilfully hold over" "after the determination" of a "written lease." Rev. Stat. ch. 42, § 15, 16. The written lease alleged in the case was from the 10th of May, 1839, to the 10th of April, 1841. The complaint in the present action was dated August 10, 1844, and counted upon "a wilful holding over" from the expiration of the written lease until the date of the complaint. The defence relied upon was, that this same plaintiff had brought a former complaint for the same cause of action, in which it was determined that the holding over was not wilful on the part of the defendant, but by virtue of a verbal letting for one year after the written lease expired. This was first pleaded in bar, concluding with a *prout patet.* Secondly, the defendant pleaded, that he did not in fact hold over wilfully, but held the premises by virtue of a parol contract for one year, not in writing. To the first plea

the plaintiff replied *nul tiel record;* to the second, a general traverse, concluding to the country; and the cause went to trial by the jury, as appears by the bill of exceptions. On the trial, upon the production of the record of the former judgment, it appeared that the cases were identical, except that in the former action, the complaint was dated Sept. 29, 1840, and counted upon a detainer up to that time. It further appeared by the *record of the judgment* in the former case, that the trial was had upon just such an issue, as is secondly joined in the present action, which was determined in favor of the defendant. The court decided there was such a record, as set forth in the defendant's plea in bar, and directed the jury to return a verdict for the defendant.

Tracy and *Converse* for the plaintiff.
Barrett for the defendant.

After stating the case as above,

Redfield, J. delivered the following opinion: This case seems to have been tried by a jury in the court below, without objection. This was indeed unnecessary, and irregular in some respects. The issue formed upon the plea of *nul tiel record*, could only be tried by the court, and should have been *first* tried, before it could be known that any issue for the jury would remain in the case. For if determined in favor of the defendant, as it in fact was, nothing would remain for the jury to try. We should not deem it necessary here to notice the subject, if the trial having passed under the revision of this court, *sub silentio*, was not liable to be thus drawn in precedent, in future trials.

The same reason last stated, makes it necessary to advert, perhaps, to the form of the defendant's first plea in bar. It alleges, that the same matter had been determined in a former trial between the same parties, without stating in favor of which party the case was determined, and then concluding with a *prout patet per recordum.* This plea is traversed, and is treated by both parties as a plea of *estoppel.* The books all agree, that the greatest strictness is required in pleading estoppels. Every fact necessary to create the estoppel must be alleged with the strictest certainty; and it must be alleged that all these facts appear by the record, which is vouched, as an estoppel; and the court then determine the matter, on inspection of the plea, if demurred to; or of the record, if that be denied. Co. Litt. 352, *b.*; Thomas's Arrangement, 3d vol. 431–433; 1 Chit. Pl. 238–9. All pleas of estoppel must rely upon the estoppel in conclusion. Co. Litt. 303 *b.*; Thomas's Ar-

rangement, 3d vol. 431; 1 Chit. Pl. 540. The case of *Shelly* v. *Wright*, (Willes R. 9,) contains an approved precedent of a plea of estoppel. But the plea in this case not being demurred to, it remains to determine its merits.

It is not easy, without considerable labor, to extract, from the numerous cases upon the subject, the precise doctrines which have been settled upon the subject of the effect of a former credit, or judgment, between the same parties, touching all or any portion of the matters again at issue. Perhaps the following corollaries are fairly deducible from all the cases, which will be found to embrace most of the principles involved in the subject.

1. There is always to be observed this distinction, between a former adjudication, when it is relied upon as having determined the entire merits of the controversy now in hand; and when it is brought forward only as settling some collateral fact involved, and which might have been merely incidental to the former controversy; that in the former case the defence is never required to be pleaded strictly, as an estoppel, while it always is in the latter case. *Stafford* v. *Clark*, (2 Bingham, 377; 9 Eng. Com. Law Rep. 437); 3 Stark. Ev. 3d Lond. ed. 960, 961. The former defence is not by way of estoppel, but only an equitable defence, like payment, release, or accord and satisfaction, an award, or account stated, all which matters, as well as a former recovery, may be given in evidence, under the general issue, in debt, or assumpsit, trover, or trespass on the case; and in trespass or covenant, need only be pleaded like any other plea in bar; and not as an estoppel. It is not essential to the defence of a former recovery, that the plaintiff should have prevailed in the former suit, but only that the trial should have been upon the merits.

2. Where the former trial is relied upon, as settling some collateral fact involved in the present trial, it must appear by the record of the former judgment, that that fact was put distinctly in issue by the parties in that case, and that it was determined by the triers. *Vooght* v. *Winch*, (2 B. & A. 668); *Fairman* v. *Bacon*, (8 Conn. R. 418.) This last segment of an estoppel by matter of record, that it should appear *by the record vouched*, that the particular fact was in issue and found, is determined by the cases of *Outram* v. *Morewood*, (3 East, 345); *Hopkins* v. *Lee*, (6 Wheaton R. 109); *Jackson* v. *Wood*, (3 Wendell, 27.)

3. But if such fact do not appear by the record to have been distinctly in issue, and determined; or if the matter be not properly pleaded, as an estoppel, it is said the record and finding in the former trial are evidence, but not conclusive. *Wright* v. *Butler*, (6

Wend. 284); *Standish* v. *Parker*, (2 Pick. 20); *Parker* v. *Standish*, (3 Pick. 288); *Spooner* v. *Davis*, (7 Pick. 147); *Vooght* v. *Winch*, *ubi sup.*; *Outram* v. *Morewood*, and many others. Upon this last subject there is, no doubt, as is said by Mr. Starkie, no inconsiderable difficulty. 3 Stark. Ev. 958. I profess myself utterly at a loss to find, from all the cases upon the subject, what rule can be laid down for determining the effect of a former verdict upon the same facts, if it is to have any effect in a future litigation, and is not conclusive. Some learned judges have said "it is evidence," "stringent evidence," "pregnant evidence," and there the matter rests. My own opinion is, that the former finding, even when it is necessary to resort to *oral* evidence to ascertain that the fact in dispute was involved in the former controversy, is still conclusive upon the parties, and of course upon the jury. But it cannot be pleaded as an estoppel, and must of course go to the jury; and as it rests *in pais*, for the jury to find whether the disputed fact was determined by the former trial, the jury, by refusing to find *that fact*, which rests in their discretion, always have it in *their power* to disregard the former verdict; in that sense, therefore, it is not conclusive, as it is when the matter appears upon the record, and may be determined by the court.

4. It is said in all the books, that estoppels must be pleaded, and if not, they are waived, but that if the party has no opportunity to plead the matter, he may give it in evidence, and it will be equally conclusive. This, I have no doubt, is correct, on the same ground that certain other defences in certain actions are required to be specially pleaded, *e. g.* the statute of limitations. But I profess myself utterly opposed to the reason which has been handed down to us for requiring this strictness of pleading in regard to estoppels of record, i. e. that "estoppels are odious," "not to be favored," "because they shut out the truth." This last clause seems to contain the pith of the whole matter, the hinge upon which all the *odium* turns — "because they shut out the truth!" If it were said that they shut out *litigation*, or *controversy about truth*, I could comprehend the force of the maxim; but by what species of logic it is made to appear that a sound construction of the same matter, after the lapse of considerable time, and the maturity which time always brings, more or less, upon all past transactions, is to be made more sure of resulting in the truth, is quite beyond my comprehension. I hold, that the entire doctrine of the conclusiveness of former adjudications, not only as to the merits of the controversy, but as to all facts distinctly put in issue, and found by a tribunal of competent authority, instead of being an

odious doctrine, is one of the most salutary and conservative doctrines of the law. Well has the maxim been appropriated to this subject — *Interest reipublicæ sit finis litium.*

From what has been said, it will be apparent that in the present case the estoppel was conclusive. It seems to possess all the necessary requisites. 1. It is the same subject-matter. 2. It is between the same parties. 3. The fact relied upon was put distinctly in issue in the former case, and found by the triers. 4. *This appears by the record.* 5. No exception is taken to the form of pleading the estoppel. *Judgment affirmed.*

Supreme Judicial Court, Massachusetts, March Term, 1845, at Boston.

IN THE MATTER OF FREDERICK D. BYRNES.

Where proceedings in involuntary insolvency were commenced before a master in chancery, under the statute of Massachusetts of 1838, c. 163, a warrant was issued, and, at the first meeting of the creditors, the petitioning creditor filed a petition praying for leave to withdraw, and for a stay of further proceedings, it was *held*, that the master had no power to grant such prayer, and that a *mandamus* would not lie to compel him to do so.

But it was *held*, that the Supreme Judicial Court had power to order a stay of such proceedings, upon such terms as they saw fit.

Under the circumstances of the present case, a *supersedeas* was ordered to issue.

THIS was an application to the court, for a *supersedeas* of a warrant issued by a master in chancery, against the estate of said Byrnes, as an insolvent debtor. The property of Byrnes had been attached in a suit against him, and he had failed to dissolve the attachment, by bond, pursuant to the 19th section of the insolvent act of 1838. A petition was thereupon presented to Ellis Gray Loring, Esq., a master in chancery, in and for the county of Suffolk, by Elias D. Pierce, a creditor of Byrnes, praying that Byrnes might be declared an insolvent, by reason of his having failed to dissolve the attachment. This petition was presented on the tenth day of May, A. D., 1845, and a warrant was thereupon issued by the master against the estate of Byrnes, a messenger appointed, and a meeting of the creditors called, to be holden at the office of the master, on the eleventh day of June following. Previous to the day of the meeting, Byrnes had secured to his several

creditors the payment of their demands against him, and at the time of the meeting the petitioning creditor appeared, and filed a petition for leave to withdraw his former petition, and for a stay of all further proceedings. This petition was dismissed by the master, on the ground that he had no authority to grant it.

An application was then made to the supreme court, by the said Byrnes, under that section of the insolvent law which gives to that court a general supervisory power, in all matters arising under the provisions of the insolvent law, praying for a *mandamus* to the master, compelling him to comply with the prayer of the petitioning creditor. Upon the presentation of the petition, the court said, that the master had no power in the premises, and that a *mandamus* would not lie to compel him. An application was then made to the court for a *supersedeas* of the warrant, a stay of all further proceedings, and an order for the restitution of his property to the said Byrnes.

This petition was filed on the fourteenth day of said June, and upon the petition an order was passed, requiring the petitioner to give notice to the master, and to the creditors of the petitioner, and to all other persons interested, to appear before the supreme judicial court, upon a given day, and show cause, if any they had, why the prayer of the petition should not be granted, and requiring public notice of the order to be given three times in the Boston Daily Advertiser.

Upon the return day of the petition, it appearing that notice had been given pursuant to the order, and no one appearing to resist the prayer of the petition, the court held, that the master had no authority under the act to stay such proceedings, but that it was within the power of the supreme court to do so, upon such terms as they saw fit. It was thereupon ordered, that the prayer of the petition should be granted, and that a *supersedeas* should issue, upon the payment by the petitioner of all costs.

John C. Park, for Byrnes.

Circuit Court of the United States, Indiana, May Term, 1845.

VAUGHAN *v.* WILLIAMS.

An owner of slaves, who takes them to the State of Illinois, and keeps them at labor six months, and then removes them to Missouri, forfeits his right to them as slaves. — [*Western Law Journal*, vol. iii., p. 65.]

Digest of American Cases.

Selections from 2 Story's (U. S. C. C.) Reports, (Continued.)

RELEASE.

Where, in answer to a cross interrogatory, proposed by counsel in a deposition, as to whether the witness had received a release from all liabilities, the witness produced the release from his own possession, as a part of his testimony; *It was held*, that he need not prove the execution of the release by the subscribing witness. And the question having been asked by the respondents, in order to establish the competency of the party as their own witness, they were estopped from denying it. *Citizens Bank* v. *Nantucket Steamboat Co.*, 16.

REVENUE LAWS.

The act of July 14th, 1812, ch. 225, s. 24, levies a duty of 15 per cent. *ad valorem*, on indigo. The act of March 2d, 1833, ch. 46, s. 5, declares, that it shall be free from duty after June 30th, 1842. The act of 1841, ch. 21, s. 1, levies a duty of 20 per cent. *ad valorem*, on all articles imported into the United States after September 30th, 1841, which were then free or chargeable with a duty less than 20 per cent. *ad valorem*, except on certain enumerated articles, among which is indigo, "which shall pay respectively the same rates of duties imposed upon them under existing laws." *Held*, that the act of 1841 did not lay a permanent duty of 15 per cent. *ad valorem*, on indigo, but left the duty thereupon as it stood under the act of 1833, and to expire after the 30th of June, 1842, and, therefore, that no duty was due upon it by the act of August 30th, 1842, ch. 270, s. 25. *U. S.* v. *Wigglesworth*.

2. *It seems*, that the revenue act of 1799, ch. 28, only applies to cases, where an actual purchase has been made. *Alfonso* v. *U. S.*, 422.

3. The phrase "actual cost" in the revenue act of 1799, ch. 128, means the actual price paid in a *bona fide* purchase, and not the market value. *Ib.*

SET-OFF.

All actions and matters of difference between the parties having been referred to referees, they made separate reports, upon which executions issued and were placed in the hands of the sheriff. Before the executions were issued, one of the party assigned the amount he might recover to third persons, who had full notice of all the facts. *Held*, that the assignee was not protected by the proviso of the statute of Maine, of the 13th March, 1821, ch. 6, s. 4, the claim not having been "assigned to him *bona fide* and without fraud;" and that the original parties having mutual executions against each other, the sheriff had a right to set-off one against another, notwithstanding the notice given to him of the assignment. *Wood* v. *Carr*, 366.

SHIPPING.

Where the schooner Cassius was chartered to the master, as owner, for a certain voyage, and by the terms of the charter-party, the general owners were to share the freight with the master; *It was held*, that the general owners were directly liable, as owners, for the voyage; and that the claim of the shippers for damages was not restricted to the master personally, although their agreement was made solely with him. *Arthur* v. *Schooner Cassius*, 81.

2. Where, also, the master was, by his agreement with the shippers, to deliver the cargo at Velasco, but upon his arriving there, the consignee refused to receive it,— *It was held*, that, as the cargo was not of a perishable nature,

the master was bound to land it at Velasco, and store it for the benefit of the shippers, and could not carry it to another port, nor sell it; although it could not be sold at Velasco. *Ib.*

3. But as the master had carried the cargo to New Orleans, and sold it, *It was held*, that the libellants were entitled to receive the actual value of the cargo at Velasco at the time when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. *Ib.*

4. Where a ship is abandoned for a total loss, the master cannot sell the cargo, and invest the proceeds in other goods unless, he be justified by necessity or by a high degree of expediency. But if he do make such a sale and investment, when they are unnecessary or inexpedient, yet, if the parties interested receive the property without objection, and adopt the acts of the master, they must bear all proper charges thereupon. If, however, they receive the property, reserving their rights and waiving no objections, and it do not yield a profit beyond the fair value of the property shipped, they are liable for no charges upon it; but if it do yield such a profit, and the master act without fraud, he is entitled to be paid a reasonable compensation and his reasonable expenses not exceeding such profit. *Laurence* v. *New Bedford Ins. Co.*, 472.

STATUTE OF FRAUDS.

Where an agreement was made for the purchase of lands, and the following paper was given: — "*Ellesworth, Dec.* 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars to be accounted for if they shall furnish me satisfactory security for certain lands on the Naragugaus River, say one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited, JOHN BLACK" — *It was held* to be a sufficient memorandum of the terms of sale, under the statute of frauds. *Clark* v. *Burnham*, 1.

2. But a parol agreement having been subsequently substituted therefor, by which the said land was transferred, by deed, to other persons than those therein mentioned, and a bill being brought by Clark to recover a certain part from the grantees, as a resulting trust to him; *It was held*, that the written memorandum only created a presumption of a resulting trust, which could be rebutted by proof; and proof being given, that Clark did not advance any portion of the purchase-money, as stated in the memorandum; *It was held*, that he was not entitled to a resulting trust, and that the contract was within the statute of frauds. *Ib.*

WITNESS.

The judicial act of 1789, ch. 20, s. 30, does not peremptorily ordain, that the testimony of witnesses, living more than a hundred miles from the place of trial, shall be taken by deposition; but it only permits such a course; and if such witnesses be present in court at the trial, and give their testimony orally, the full costs of their travel and attendance should be allowed in the costs. *Prouty* v. *Draper*, 199.

2. By the statute of 1 Will. IV., ch. 22, giving authority to English courts of law to issue commissions for the examinations of witnesses abroad, the court may, in its discretion, allow the expenses of the witnesses, or the costs of the commission. *Ib.*

3. Postage paid on a commission should be allowed as a part of the costs thereof. *Ib.*

VERDICT.

A verdict will not be set aside in a case of *tort*, for excessive damages, unless it clearly appear, that the jury committed some gross and palpable error, or acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated. *Whipple* v. *Cumberland Manufacturing Co.*, 662.

WILLS.

The state courts have exclusive jurisdiction over the probate of wills and codicils; and the probate thereof in the proper state court is conclusive. *Langdon* v. *Goddard*.

Notices of New Books.

A Discourse, commemorative of the Life and Character of the Hon. Joseph Story, LL.D., an Associate Justice of the Supreme Court of the United States, and Dane Professor of Law in Harvard University; pronounced on the eighteenth day of September, A. D. 1845, at the request of the Corporation of the University, and the Members of the Law School. By Simon Greenleaf, LL.D., Royall Professor of Law in Harvard University. Boston: Charles C. Little & James Brown. 1845. pp. 48.

Professor Greenleaf is well known as an excellent lawyer, and the author of a most valuable treatise on Evidence, but he has not made so many contributions to general literature, as his taste and cultivation would have justified him in doing. He is the master of an excellent English style, as his work on Evidence alone sufficiently proves. His inaugural discourse we remember as a beautiful exposition of the duties of the legal profession, marked by an elevated tone of moral feeling and great neatness of expression. The present discourse, too, is an honorable literary effort. He was eminently fortunate in his subject. Few men have ever lived, more worthy of unqualified and unalloyed eulogium than Judge Story. His foibles were as few and as slight as the lot of humanity will permit, and they were lost in a blaze of gifts, virtues, and excellencies. The most glowing language of commendation would be no overstatement in his case. His eulogist was not called upon to do violence to his conscience, or to struggle between his sense of truth and his reluctance to say anything inappropriate to an eulogy.

Professor Greenleaf's discourse is remarkable for its simplicity and quietness of tone. It is entirely free from the defects of extravagant and indiscriminate praise, to which eulogies are peculiarly exposed. It is calm and conscientious. His love and reverence for his departed friend seem to have imposed it upon him as a sacred duty to exaggerate nothing and overstate nothing. It is also a production of much literary merit. It has that simplicity and transparency of style which we always notice in Professor Greenleaf's publications. The biographical sketch of Mr. Justice Story is ample and complete, and forms alone the highest eulogy which could be pronounced upon him. His character is delineated with feeling and beauty, and the impressive simplicity of the concluding observations is a fit close to the sketch of such a life and character.

"In the estimation of the great Grecian lawgiver, he alone was to be accounted happy, whom Heaven blessed with success to the last; for the happiness of one who had the dangers of this life to encounter, he deemed no better than that of the champion, while the combat is still undetermined and the crown uncertain. But this great man died, already crowned with the laurels of victory. He carried to the grave no ordinary regrets, no common honors; for he died in the midst of the most active beneficence. Let us thank God that he lived so long, and did not survive his power to do good; and that, although this brilliant light of jurisprudence has departed, yet there will forever linger in our sky the sunset glory of his undying example."

Intelligence and Miscellany.

Singular Case of Conflicting Testimony. — At the last October term of the common pleas in Lowell, a person was indicted under the name of Henry Sherman, for an assault, on Saturday, the 26th day of July last, upon the person of a little girl of the age of twelve years, at Medford, and was also indicted for a similar assault, at Newton, on Monday, 28th July, upon the person of another girl, aged thirteen. The assault in each indictment was alleged to have been with a felonious intent. As the same facts were relied upon in defence in each case, it was arranged between the counsel, that both cases should go to the same jury and be tried together. At the very outset it became manifest that the whole case turned upon a question of personal identity, and that, in fact, there was nothing else in controversy. The trial was conducted by A. H. Nelson, Esq., for the commonwealth, — Thomas Hopkinson and Seth Ames, Esqs., for the defendant.

The sufferer in the Medford case testified that on the Saturday named, she was gathering berries in a field, in company with a young woman seventeen years of age, and a boy of ten years, and a little girl still younger; that a man approached them, asked if her name was Ann — said her mother was looking for her, and offered to show her the way to the place where her mother was. She followed him unsuspectingly, till they reached a secluded place among some trees, when he assaulted her, threatening to kill her with a knife if she made any noise. After desisting from the unavailing attempt to accomplish his brutal purpose, he asked her how she should describe him, and she accordingly did on the spot describe him as pale-faced, dark-haired, &c., and dressed in dark-colored clothes, having a basket tied up in a red handkerchief. He then asked what was in the basket; to which she replied, she did not know. He asked, "if she came from the poor-house" — "whether she had father, brothers, mother, or sisters" — "what sort of a coat he had on" — and threatened to "cut her ears off" if she ever told of it. He then got over the wall, and went towards Salem street. She testified most distinctly and positively, that the prisoner was the man — wearing at the trial the same dress, (except the pantaloons) — and that she immediately identified him at the jail, and before the magistrate who examined him in Cambridge.

Helen A. Gale (17 years old) testified that she was one of the party gathering berries — saw the man approach, heard what he said, and saw him go away, with the little girl following. She identified the prisoner with the same distinctness and positiveness, as the man; had no doubt on the subject now, or when she saw him at the jail, and before the examining magistrate.

Mortier Gale (the little boy, 10 years old) confirmed this story in every particular, and knew the prisoner was the same man "by his looks;" and described the dress and basket, as the previous witnesses had done; and had seen and identified the prisoner at the jail and before the magistrate.

John Butterfield, of Charlestown, testified that he was in charge of a section of the Maine railroad, near the ca-

nal; that on Saturday, 26th July, he saw a man in dark clothes, with a basket, &c., walking on the track of the road towards Malden, who asked some question about the cars, and passed on; that he had seen him in the neighborhood before, namely, on Thursday; that he thought, but was not confident, he had a light hat on, and that the prisoner was certainly the man; that he identified him at the jail, and had no doubt on the subject.

Isaac Wetherbee, who was employed on another section of the same railroad, testified to having seen, on Saturday, a man going towards Malden, and inquiring about the cars. He had also seen him on Thursday or Friday; was struck with his personal appearance; thought at the time that his hair and eyes resembled those of his (witness's) sister's children; and gave the same confident testimon that the prisoner was the man. Both these witnesses professed to be as confident on that point as they should be of the identity of any person of their acquaintance.

The sufferer in the Newton case then took the stand, and testified that she and three other girls were gathering berries on Monday the 28th July; that a man approached, asked if her name was Ann, and induced her to go away with him, by a story that a little child was crying, and had lost her way. He then made an assault, threatening to kill her if she screamed; but her cries attracted assistance, and the miscreant took to flight. He had been about there some hour or so before he assaulted her. About a fortnight after, she was taken by her father to a room in the Spring hotel in Watertown, full of men, of whom many were strangers to her, and without any difficulty or doubt identified the prisoner as the man who assaulted her. She now testified that he was the man; that she knew him by his looks, pale face, dark hair, and described his dress; that he had a handkerchief bundle on 28th July; that she noticed him in the morning, before he tried to entice her away.

Lois Brigham (about the same age.) confirmed the previous witness in every particular, except as to the assault, which of course she did not see; was taken separate into the room at the Spring hotel, and there without hesitation identified the prisoner as the man.

Europe Houghton lived near the spot; several times saw a man "lurking about" there between 10 and 12 A. M. on 28th July; did not speak to him, but noticed him particularly, because he wondered why he should be "lurking about;" at 2 or 3 o'clock saw the same man running at full speed; somebody cried "stop him;" he attempted to stop him, and pursued, but the man escaped in the woods. He distinctly and positively swore that the prisoner was the man. That on 14th August, the prisoner came on foot and alone to his house, and he (witness) knew him instantly to be the man; that he drank water at the well, inquired the way to Dedham, and on being told, said he was so far out of his way, they "had better cut his throat and bury him," and then walked off. The witness and some of his neighbors immediately pursued, overtook, and arrested him, and carried him to the Spring hotel, where he was identified by the girls, as already mentioned. That the prisoner when arrested was walking, and not running; that on being told he must go back, he asked what for, and on being told that it was for abusing the girl (naming her) on 28th July, he said he "never was in this state before."

Mrs. Houghton also saw the man lurking about on 28th July, and he spoke to her. She heard the alarm, and saw him run away. She also identified him with the same positiveness as the other witnesses.

Mr. Kent saw the prisoner after he was arrested, and rode with him to the Spring hotel, and led the girls *separately* into the room where the prisoner was with many other persons; put to each the question, "Can you point out the man?" and each pointed out the prisoner without hesitation, and without having had any previous explanation of the reasons why they were carried there: the prisoner at that time making no answer whatever.

The prisoner denied the offence when arrested; said he never was in that part of the world before; said that on 28th July he was in Keene, N. H., and could prove an "alibi," and on that very day had entered his name on the stage-book at Keene. The witnesses did not rely upon the *voice* as an element of certainty as to the prisoner, but said they "knew him by his looks,"

his general appearance, complexion, hair, and height.

Such being the testimony, it was with some degree of amazement and incredulity that the court and jury received from the prisoner's counsel the information that they should prove that he was NOT the man, and that the district attorney would not even go to the jury with the case — a prediction which was soon fulfilled to the letter.

The first witness for the prisoner was *Thomas F. Ames*, of Keene, N. H., where he had lived for forty-two years past, and followed the business of saddle and harness maker. On Tuesday, 22d July, he went to Chesterfield (about ten miles west of Keene) to buy leather, and had not been there since. As he was about to return, he met the prisoner, (an entire stranger,) who was on foot, and wished to ride. He rode with him to Keene — had, of course, considerable conversation, and left him at the Eagle hotel; saw him and spoke with him several times, nearly every day, until 28th; saw him and spoke with him on 26th July, at an exhibition of wild animals; sold him a small trunk, (which was produced by the prisoner in court, and identified by the witness, by numerous peculiarities in the lining, &c. &c.); saw him on Monday morning, 28th July, with the trunk, going towards the stage-office — did not learn his name; he had on brown or checked pantaloons, very much worn and mended; never saw him again until he saw him in the dock in court, at which time the prisoner recognized him and he the prisoner at once; fixed the dates by the bill of the leather and the charge of the trunk; and, independently of the written papers, remembered that the caravan was at Keene, on Saturday of the same week in which he went to Chesterfield.

Lewis Campbell, of Keene, formerly register of deeds for the county of Cheshire, testified that as Harrington, owner of the Eagle hotel, was afflicted with a lameness, he entered into his employment to assist in carrying on the business of the house; that the prisoner came there on Tuesday, 22d July; that the witness took his meals at the same table, and every night gave him his candle at bed-time from that date till 28th July; knew it was the week when the caravan was there — knew the caravan was advertised for, and arrived, on the 26th; did not learn the prisoner's name; he had no apparent business; knew that he came there the Saturday following the 19th July, at which time the witness commenced assisting Mr. Harrington; never knew the prisoner before, or anything about him; knew him and was recognized by him the instant they saw each other in court; knew that he left on the morning of the 28th, and never saw him again until they met in court; he brought with him a small handkerchief-bundle, and carried away a small black trunk.

Daniel Watson, a native and citizen of Keene, and a clerk in the office of chief justice Parker, testified that he boarded at the Eagle hotel while the prisoner was there; and told substantially the same story as that detailed by Campbell.

George Ward, owner and driver of the stage-coach between Keene and Concord, N. H., found the name of "Mr. Sherman" on his register, under date of 28th July; carried him on that day on the seat with himself; dined with him alone at Henniker; collected the sum of $100 of a debtor on the way, which was indorsed on the note "28th July" in his (prisoner's) presence. — The prisoner talked with him on that subject after they had renewed the journey; left the prisoner at the Columbian, in Concord, that night; saw him again on the morning of 29th July; did not again see him until he saw him in the dock in court, and knew him, and was recognized by him at once.

Thomas W. Stewart, a tailor, of Concord, N. H., identified the prisoner as a man who applied to him to make up some cloth into pantaloons on 29th July — delivered the pantaloons the same day at five o'clock, P. M.; identified the pantaloons as the same which the prisoner at the time of the trial had on, and gave some particulars about them by which he knew he was not mistaken. Struck with the prisoner's appearance when he first saw him, and thought he strongly resembled an acquaintance of his (Stewart's.)

M. D. McConihee, of Merrimack, N. H., testified that the prisoner came on foot, into Merrimack, in an afternoon, about the last of July or first of August — had considerable conversation with

him; saw him the next morning, after breakfast, on foot, going in the direction of Nashua.

These witnesses one and all identified the prisoner in the most positive terms. The counsel for the defendant, after declaring themselves fully prepared to prove that from the 31st July to 13th August he resided in Lowell, and lodged at the Howard house, announced to the court that they felt convinced that they might safely rest the case where it then stood.

At this stage of the case, the court intimated that if the assaults charged in the indictments actually took place on the 26th and 28th July, the prisoner had made out a full defence, and notwithstanding the strength of the case against him, the alibi was incontrovertibly proved. The district atterney then said, that unless he could make it appear that the assaults happened on the 19th and 21st July, he should not feel it his duty to ask for a conviction. On consultation, it was found that the dates had been truly stated. The outrages were, in fact, committed on the 26th and 28th July. A verdict was taken for the prisoner by consent, and he was accordingly discharged.

There was some reason to believe that the prisoner had borrowed the name of Sherman, as more *convenient* than his genuine patronymic. There was moreover, something in his appearance and manner that conveyed the impression that he was on the whole *un mauvais sujet*. This fact, and the circumstance that he travelled on foot and alone, may account in some degree for the confidence of some of the witnesses who testified against him.

The witnesses on both sides testified honestly, and the discrepancy was certainly very extraordinary. To some members of the profession, the mystery seemed impenetrable, and some eagerly inquired, after the trial, where the *trick* lay. His honor judge Ward pronounced it a case well calculated to shake all confidence in human testimony. But is it not, after all, a case in which, on a strict analysis, the contradiction is apparent rather than real? The facts testified to by the prisoner's witnesses were matters about which it would be idle to say that there was room for mistake or exaggeration. On the other hand, the government's evidence only proved that the offender *looked* like the prisoner. The witnesses were confident that he was the man — they "knew him by his looks." In other words, the whole amount of their testimony was that they looked alike. When they said that he *was* the man, and that they were as certain of it as they could be in the case of any one of their neighbors or acquaintance, they incautiously swore to a conclusion which they had drawn from imperfect data. Notwithstanding the very remarkable fact, that the ruffian actually called his victim's attention (in the Medford case) to his looks and dress, she can hardly be supposed to have been in a condition to view him with the accuracy of a portrait painter. That there was some resemblance there can be no doubt — probably a strong one; but it *may* have been a vague and slight similarity, like that which is continually making people mistake for the moment one person for another. Both were strangers, on foot, alone, of a suspicious appearance, and perhaps wearing the haggard look of dissipation or weariness. How easily might the friends of the injured party, in the eagerness of their sympathy and honest indignation, feel sure that they "had caught the rascal!" How easy it is to select the accused, the supposed felon, the friendless outcast, in a crowd of excited and exulting honest men! Confidence begets confidence, and the result is at last a mass of testimony that seems to sweep everything before it, and leaves men perplexed and confounded if it should prove, as in this instance, to be a mistake after all. It is a lesson to witnesses to be *careful* as well as honest; to swear to facts, and leave it to the court and jury to draw the *inferences*.

Judge Story. — The death of Judge Story has caused a marked sensation in England. The eulogy by Mr. Sumner, which originally appeared in the Boston Daily Advertiser, and which we copied into our journal, has been extensively republished on the other side of the Atlantic. The London Times says "it bears internal evidence of having been written by one more than ordinarily qualified to appreciate the high character and great attainments by which Mr. Justice Story had achieved not only the highest reputation among his fellow-citizens, but very considerable authority

in Europe." The Chronicle gives it to its readers with a long introduction. "America," it says, "has lost one of her greatest men, in the person of the celebrated jurist, Judge Story." "The event has produced a deep and general feeling of grief to the United States, and this feeling will meet with sympathy in every country in which the character of a learned, able and upright judge is held in reverence. The name of Judge Story is well known, not in England only, but in every part of Europe, by his 'Commentaries on the Constitution of the United States,' his 'Treatise on the Conflict of Laws,' and other legal works of the highest reputation. In his native country he was more than an author; as one of the judges of the supreme court of the U. States for no less than thirty-four years, he had a large and important share in the administration of justice, and in combination with his high judicial functions, he discharged the duties of a professor of law in Harvard University. In every department he was beloved and honored by his countrymen, to a degree that goes far to disprove the impression, that American democracy is averse to personal superiorities, and unfriendly to the development of great talents in the public service." After stating that the American journals present few particulars of Judge Story's life, the Chronicle says that they present a picture — "and a picture which even the warmth of personal friendship and admiration has not been able to overcharge — of one of the noblest judicial characters with which any age or country has been adorned. Learning, minute and yet most comprehensive, ready for every practical purpose, and at the same time rendered, by a philosophical spirit, subservient to the interests of universal truth; an intellect both rapid and sure, quick, yet shrinking from no amount of toil, subtle, but never the slave of its own subtilty; an uprightness so clear and stern, that it forbade the faintest suspicion of indirect influence; and with all this an irresistibly attractive personal demeanor, a warmth of moral enthusiasm, unconsciously exhibited in the details of ordinary and domestic life, and a sweet simplicity and joyousness of nature, which, even in old age, preserved the animation and ready sympathy of youth — these are only some of the characteristics of which the American journals remind us, but which have long been associated with the name of Judge Story."

Law Review. — The last number of the Law Review (London) for August, among other interesting articles, contains one *On the Proof of Handwriting*, in which a most liberal draft is made upon Mr. Greenleaf's Treatise on Evidence, and without the slightest acknowledgment of the source from which the writer obtains some of the best portions of his article. Whole paragraphs with the accompanying notes are thus taken, and after a plagiarism of this sort on page 294, the writer remarks with irresistible coolness, "It will be seen, by referring to the last note, that the American decisions do not add much weight to either side of the argument; and they are here noticed rather as furnishing to the curious reader ample sources for further investigation, than as affording a safe, or indeed an intelligible guide on which to rely." The writer then proceeds immediately to take, without acknowledgment, that portion of section 581 in Mr. Greenleaf's work, wherein he states the rule which he has extracted from the various judgments on the point in discussion, together with the note containing references to no less than four American cases, and not one English case!

To Subscribers. — The publishers of the Law Reporter have requested us to make an urgent appeal to those subscribers at a distance who have not paid their subscriptions. They state that many gentlemen have been remiss in this particular, and although the amount due from each is small, yet in the aggregate it is sufficiently large to put the publishers to serious inconvenience. Many of the subscribers to this work are in remote places, and the expense of employing an agent to visit them personally would be more expensive than the object seems to warrant. The terms of the work are considered reasonable, and we join with the publishers in the hope that those gentlemen who are in arrears, will forthwith remit the amounts due for their subscriptions. We allude to this subject with the more

freedom, as we have no pecuniary interest in the matter whatever; and we may not find a more convenient opportunity than the present to state, for reasons that may be obvious, that, from the first establishment of this journal, the departments of editor and publishers have been entirely distinct — a course that has been adopted not merely from motives of convenience, but in order that the course of the journal might not by any possibility be influenced by the poor consideration of a loss or gain in the number of subscribers.

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

At the late trial of *Reed* v. *Proprietors of Locks and Canals*, involving the title to a valuable real estate in Lowell, in the circuit court of the United States for the first circuit, Mr. Webster, in his argument to the jury for the defendants, suffered himself to indulge in some personal remarks in relation to Mr. Parker, of Worcester, of counsel for the plaintiff, that were painfully interesting. * * * At the trial of Wyman, of which we give an account in our present number, Mr. Webster made a motion after one of the defendant's points had been overruled, and took occasion to say, that he did it rather to save his client's rights than with any expectation that the motion would be granted; that in preparing that opinion, the court had obviously anticipated the motion which the defendant had made, and had referred to authorities to sustain it, which had not been cited by the commonwealth's attorney, and which the defendants' counsel had not had an opportunity to answer; and he took the occasion to say, that he should at a proper time propose to go to the jury upon the whole subject of the law of the case which had been discussed. Judge Washburn overruled the motion, and remarked, that the appointment of lawyers to the bench implied the idea that they were expected to know something beforehand of the law by which trials were to be regulated, and not merely to wait and have the authority that either side might see fit to cite at the time, and to decide upon the comparative weight of these; and as to the intimation which the counsel had given in regard to the course he proposed to take in the argument of the case, the court had too much respect for the eminent character and learning of the counsel to be willing to presume, that his own self-respect would suffer him to pursue any other than a proper course in the management of the cause. The rebuke of the judge was none the less emphatic, that it was couched in language so courteous as scarcely to admit of a reply.

As every thing relating to the law book trade must be interesting to the profession, we intended before this to have called attention to the advertisement of Messrs. Little & Brown, who have recently made an arrangement with English publishers, by which they can furnish works printed and published in England *cheaper than they are sold to the profession there*. How this can be done may be regarded as a mystery of the trade, but we suppose the object of the English houses must be to compete in the American market, with the booksellers who reprint English editions. It really seems probable that law books will in the course of time be furnished at reasonable rates. We have lately seen in the shop of the gentlemen above referred to, a superb collection of foreign law books, recently imported, to which we venture to call the attention of those who are able and willing to purchase.

The Law Magazine for November, in mentioning Judge Story's death, says, "It is no mean honor to America, that her schools of jurisprudence have produced two of the first writers and most esteemed legal authorities of this century: — the great and good man who has just been taken from us, and his worthy and eminent associate, the Professor Greenleaf. Upon the existing law of contracts and the law of evidence, more light has shone from the new world than from all the lawyers who adorn the courts of Europe."

The obliging correspondent in Ohio, who suggests the propriety of furnishing portraits of eminent jurists for this journal, is informed that the subject has often been under consideration, and is not entirely relinquished; although our impression has been that the money which such expensive ornaments would cost, is more usefully expended in improving the character of the work itself.

The corresponding members of the London society for promoting the amendment of the law, are Theodore Sedgwick, Esq. of New York, Arthur Edward Gayer, Esq., LL. D., Dublin, and M. Felix, Docteur en Droit, Avocat à la Cour Royale, Paris.

The resolutions, offered by Mr. Webster at the meeting of the Suffolk Bar on the occasion of Judge Story's death, were drawn up by George S. Hillard and Charles Sumner, Esquires.

The new hall and buildings of Lincoln's Inn were opened on 30th October. Her Majesty and Prince Albert breakfasted and dined with the society upon the occasion.

The Queen has conferred the order of knighthood upon Fitzroy Kelly, Esq., the new solicitor-general.

At the trial of Avery, Mr. Mason asked a female witness if she were married? "No Sir, I hav'nt that privilege."